Supreme Court, U.S.
FILED
98 492 SEP 23 1998
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of The United States

October Term 1997

BEVERLY HEALTH AND REHABILITATION SERVICES, INC., et al.

Petitioners,

v.

GERALD KOBELL, Regional Director for Region Six of the National Labor Relations Board for and on behalf of THE NATIONAL LABOR RELATIONS BOARD

Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

WARREN M. DAVISON*
THOMAS P. DOWD
Littler Mendelson
The World Trade Center, Suite 1653
Baltimore, Maryland 21202-3005
(410) 528-9545

Attorneys for Petitioners
**Counsel of Record*

APPELLATE ADVANTAGE
4264 N. OAK TRAFFICWAY◆KANSAS CITY, MO 64116◆816-453-2424

113 pp

QUESTIONS PRESENTED FOR REVIEW

1. A. Whether the legal standard that governs the issuance of an injunction under Section 10(j) of the National Labor Relations Act ("NLRA") should be the four-part test employed by the Courts of Appeals for the First, Second, Seventh and Ninth Circuits or the two-pronged approach used by the Third, Fifth, Sixth, Tenth and Eleventh Circuits.

   B. If this Court were to adopt the Third Circuit's two-pronged test for Section 10(j) cases, may a district court issue an injunction without first examining whether the National Labor Relations Board's legal theory violates the plain language of the NLRA.

2. Whether the two-pronged test that the Court of Appeals for the Third Circuit has created for analyzing injunction requests under Section 10(j) contradicts the Supreme Court's decisions in Weinberger v. Romero-Barcelo, 456 U.S. 305, 102 S. Ct. 1798 (1982) and Hecht Co. v. Bowles, 321 U.S. 321, 64 S. Ct. 587 (1944), which hold that federal courts must apply traditional equitable criteria when any moving party seeks an injunction under the authority of a federal statute, unless clear statutory language provides a different standard.

3. Whether a union that gives a health care institution a ten-day strike notice, as required by Section 8(g) of

the NLRA, may later unilaterally extend its strike notice by up to three days despite Section 8(g)'s unambiguous requirement that "[t]he notice, once given, may be extended by the written agreement of both parties."

LIST OF PARTIES TO PROCEEDINGS IN THE COURT OF APPEALS

The Petitioners in this case are Beverly Health and Rehabilitation Services, Inc. (BHRS), Beverly Enterprises-Pennsylvania, Inc. (BE-P) and 20 individual nursing homes in Pennsylvania that are owned and/or operated by either BHRS or BE-P. These twenty individual nursing homes are Beverly Manor of Monroeville, Clarion Care Center, Fayette Health Care Center, Grandview Care Center, Haida Manor, Meadville Care Center, Meyersdale Manor, Mt. Lebanon Manor Convalescent Center, Murray Manor, Richland Manor, William Penn Nursing Center, Beverly Manor of Reading, Beverly Manor of Lancaster, Blue Ridge Haven Convalescent Center West, Caledonia Manor, Camp Hill Care Center, Carpenter Care Center, Stroud Manor, and York Terrace Nursing Center.

Petitioners are subsidiaries of Beverly Enterprises, Inc., which is traded publicly on the New York Stock Exchange. Petitioners are not related to any other publicly-held or publicly-traded companies. Aside from the Respondent listed in the caption of this case, no other parties appeared below.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF THE PARTIES ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

DECISIONS BELOW xi

JURISDICTION xii

STATEMENT OF THE CASE 1

I. THIS COURT NEEDS TO RESOLVE THE DEEP SPLIT OF AUTHORITY AMONG THE COURTS OF APPEALS REGARDING THE STANDARD THAT DISTRICT COURTS MUST APPLY IN INJUNCTION PROCEEDINGS UNDER SECTION 10(j). 6

II. THE EXISTING SPLIT OF AUTHORITY AMONG THE CIRCUITS POSES AN IMPORTANT QUESTION REGARDING THE POWER OF FEDERAL COURTS TO GRANT OR WITHHOLD EQUITABLE RELIEF FOR ALLEGED VIOLATIONS OF THE NLRA. 9

III. THE CREATION OF A TWO-PRONGED TEST FOR SECTION 10(j) PROCEEDINGS CONTRADICTS THIS COURT'S HOLDINGS IN ROMERO-BARCELO AND HECHT CO. 14

IV. THE BOARD'S LEGAL THEORY IN THIS CASE IS GROUNDLESS, AND THE BOARD IS NOT LIKELY TO PREVAIL ON THE MERITS OF ITS CLAIM. 19

CONCLUSION 29

APPENDICES

TABLE OF AUTHORITIES

PAGE

CASES

Aguayo v. Tomco Carburetor Co.,
853 F.2d 744 (9th Cir. 1988) 17

American Ship Bldg. Co. v. NLRB,
380 U.S. 300, 85 S. Ct. 955 (1965) 13

Angle v. Sacks,
382 F.2d 655, (10th Cir. 1967) 7

Asseo v. Pan American Grain Co., Inc.,
805 F.2d 23 (1st Cir. 1986) 10

Bailey v. U.S.,
516 U.S. 137, 116 S. Ct. 501 (1995) 22

Beverly Enterprises-Pennsylvania Inc. v.
District 1199P Service Employees International
Union, AFL-CIO,
Case No. 96CV00064j (W.D. Pa. 1997)
(unpublished), affirmed 141 F.3d 1153
(Table) (3d Cir. 1998) iii

Bio-Medical Applications of New Orleans, Inc.,
240 NLRB 432 (1979) 19, 21, 22, 23, 26

Boire v. Freight Carriers, Inc.,
515 F.2d 1185 (5th Cir. 1975) 7

Chevron U.S.A. v. Natural Resources
Defense Council, Inc.,
467 U.S. 837, 104 S. Ct. 2778 (1984) 19

Cohen v. Bd. of Trustees of Univ. of Medicine,
867 F.2d 1455 (3rd Cir. 1989) xii
Colgate-Palmolive-Peet Co. v. NLRB,
338 U.S. 355, 70 S. Ct. 166 (1949) 19
D'Amico v. U.S. Service Industries, Inc.,
867 F. Supp. 1075, 1082-1085
(D. D.C. 1994) 7, 9, 17
Dowd v. Intern. Longshoremen's Ass'n, AFL-CIO,
975 F.2d 779, 784 (11th Cir. 1992) 7
Gottried v. Frankel,
818 F.2d 485 (6th Cir. 1987) 7
Hecht Co. v. Bowles,
321 U.S. 321, 64 S. Ct. 587 (1944) ..... *passim*
Hirsch v. Corban Corporations, Inc.,
949 F. Supp. 296 (E.D. Pa. 1996) 8
Hirschey v. F.E.R.C.,
777 F.2d 1 (D.C. Cir. 1985) 24
International Broth. of Elec. Workers,
Local Union No. 474 v. NLRB.,
814 F.2d 697 D.C. Cir. 1987) 25
Johnston v. J.A. Hackney & Sons, Inc.,
300 F. Supp. 375 (E.D. N.C. 1969) 9
Kaynard v. Mego Corp.,
633 F.2d 1026 (2nd Cir. 1980) 7
Kinney v. Pioneer Press,
881 F.2d 485 7th Cir. 1989) 7, 17

Kobell v. Beverly Health and Rehabilitation Services, Inc. et al,
142 F.3d 428 (Table) (3rd Cir. 1998) xi
Kobell v. Beverly Health and Rehabilitation Services, Inc. et al,
Civil Action No. 96-1280 (W.D. Pa.),
Memorandum and Order dated Feb. 7, 1997 xi
Kobell v. Beverly Health and Rehabilitation Services, Inc. et al,
987 F. Supp. 409 (W.D. Pa. 1997) xi
Kobell v. Suburban Lines, Inc.,.
731 F.2d 1076 3rd Cir. 1984) 7, 8, 10, 12
Minnesota Mining and Mfg. Co. v. Meter,
385 F.2d 265 (8th Cir. 1967) 9
NLRB v. Health Care & Retirement Corp. of America,
511 U.S. 571, 114 S Ct. 1778 (1994) 24
NLRB v. Stationary Engineers, Local 39,
746 F.2d 530 (9th Cir. 1984) 21, 28
NLRB v. Washington Heights-West-Inwood Mental Health Coun.,
897 F.2d 1238 (2d. Cir. 1980) 21
Pascarell v. Vibra Screw, Inc.,
904 F.2d 874 (3rd Cir. 1990) 8
Porter v. Warner Holding Co.,
328 U.S. 395, 66 S. Ct. 1086,
90 L. Ed. 1332 (1946) 15
Pye v. Sullivan Bros. Printers, Inc.,
38 F.3d 58 (1st Cir. 1994) 7

Ratzlaf v. U.S.,
510 U.S. 135, 114 S. Ct. 655 (1994) 22
Scott v. El Farra Enters., Inc.,
863 F.2d 670 (9th Cir. 1988) 17
Sharp v. Koronis Parts Inc.,
927 F. Supp. 1208 (D. Minn. 1996) 9
Squillacote v. Graphic Arts International Union,
513 F.2d 1017 (7th Cir. 1975) 17
Squillacote v. Graphic Arts International Union,
540 F.2d 853 (7th Cir. 1976) 17
Walker Methodist Residence and Healthcare Center, Inc.,
227 NLRB 1630 (1977) 21
Weinberger v. Romero-Barcelo,
456 U.S. 305, 102 S. Ct. 1798 (1982) ..... i, 14

STATUTES

28 U.S.C. § 1254(1) xiii
28 U.S.C. § 1292(a)(1) ..... xii, 5
29 U.S.C. § 160(j) ..... xiv, 6, 16
29 U.S.C. § 160(l) 17
33 U.S.C. § 1251 *et seq* 14
33 U.S.C. § 1319(b) 14

OTHER AUTHORITIES

120 Cong. Rec. 12994 (May 2, 1974) 26
120 Cong. Rec. 16899 (May 30, 1974) 25
c. 120, Title I § 101, 61 Stat. 146 xii

S. Rept 93-766, 9 3d Cong., 2d Sess. 4;
H. Rep. 93-1051 90 3d Cong., 2d Sess. 3 23

RULES

Fed. R. Civ. Proc. 65 ..... 4, 29

DECISIONS BELOW

The proceedings below are officially and unofficially reported as follows:

1. Kobell v. Beverly Health and Rehabilitation Services, Inc. et al, 952 F. Supp. 242 (W.D. Pa. Jan. 26, 1997) (vacated and withdrawn from published volumes pursuant to an unpublished Memorandum and Order by the U.S. District Court for the Western District of Pennsylvania dated Feb. 7, 1997).
2. Kobell v. Beverly Health and Rehabilitation Services, Inc. et al, Civil Action No. 96-1280 (W.D. Pa.), Memorandum and Order dated Feb. 7, 1997 (unpublished) (granting partial summary judgment to the National Labor Relations Board) (Apdx C - 10).
3. Kobell v. Beverly Health and Rehabilitation Services, Inc. et al, 987 F. Supp. 409 (W.D. Pa. 1997) (granting injunctive relief) (Apdx C - 24).
4. Kobell v. Beverly Health and Rehabilitation Services, Inc. et al, 142 F.3d 428 (Table) (3rd Cir. 1998) (affirming injunctive relief) (Apdx B - 5).

JURISDICTION

On April 4, 1997, the United States District Court for the Western District of Pennsylvania issued an injunction which, in relevant part, requires the Petitioners here to reinstate strikers to employment positions that these strikers held prior to their work stoppage and their subsequent offers to return to work (Apdx. C-24, 46). The District Court's injunction was based largely upon an earlier summary judgment decision and order issued on February 7, 1997, in which the District Court concluded that the legal theory underlying the National Labor Relations Board's unfair labor practice allegation could not be subjected to examination by the District Court because any determination adverse to the Board would undermine the Board's pending administrative hearing (Apdx. C-10, 22).

Petitioners timely filed their Notice of Appeal on April 15, 1997 with the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. § 1292(a)(1). The Court of Appeals had jurisdiction to review both the April 4, 1997 injunction as well as the earlier February 7, 1997 summary judgment decision since the two orders were closely related. Cohen v. Bd. of Trustees of Univ. of Medicine, 867 F.2d 1455, 1468 (3rd Cir. 1989).

On February 18, 1998, the Court of Appeals issued a Judgment Order affirming the judgment of the District Court. On March 26, 1998, Petitioners timely filed a Suggestion for Rehearing In Banc and Petition for Panel Rehearing. The

Court of Appeals denied the petition and suggestion on July 2, 1998. This Court has jurisdiction to issue a Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 10(j) of the National Labor Relations Act provides:

> The Board shall have power, upon issuance of a complaint as provided in a subsection(b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition, the Court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper. [29 U.S.C. § 160(j)].

Section 8(g) of the National Labor Relations Act provides:

> A labor organization before engaging in any strike, picketing, or any other concerted refusal to work at any health care institution shall, not less than 10 days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an additional agreement following certification or

recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of subsection (d) of this Act. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties. [29 U.S.C. § 158(g)].

STATEMENT OF THE CASE

Petitioners Beverly Health and Rehabilitation Services, Inc. and its subsidiary Beverly Enterprises-Pennsylvania, Inc. own and/or operate nursing homes, including twenty unionized nursing homes in Pennsylvania (Apdx. C-25). Those individual nursing homes (collectively the "Nursing Homes") are also Petitioners here. At all relevant times, three local unions (collectively the "Unions") have separately been certified as the representatives of bargaining units of employees at the Nursing Homes for purposes of collective bargaining. In 1994 and 1995, the collective bargaining agreements that covered these employees expired, and the Nursing Homes and the Unions negotiated in an effort to reach new agreements, but these negotiations were unsuccessful (Apdx. C-26).

On March 15, 1996, the Unions sent written notices to 15 of the Nursing Homes announcing the Unions' intent to commence a strike at 7:00 a.m. on March 29, 1996 (a Friday) to protest various alleged unfair labor practices related to bargaining (Apdx. C-27, D-49). These written notices were mandatory under Section 8(g) of the National Labor Relations Act (the "NLRA"), which requires a labor organization to give a health care institution at least ten days notice before commencing any kind of strike. Section 8(g) provides, in relevant part:

> A labor organization before engaging in **any** strike, picketing, or other concerted refusal to

> work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing . . . of that intention . . . . The notice shall state the date and time such action will commence. **The notice, once given, may be extended by the written agreement of both parties.**

29 U.S.C. § 158(g) (emphasis added).

On March 27, 1996, less than two days before the scheduled start of the strike, the Unions notified the Nursing Homes that the Unions were unilaterally extending the date and time of the strike by 71 hours until 6:00 a.m. on April 1, 1996 (a Monday). (Apdx. C-27, D-51). The Unions did not seek the Nursing Homes' consent to this unilateral extension prior to announcing the extension, and the Nursing Homes never gave consent, by any means, to the 71-hour extension. (Apdx. C-27). To the contrary, the Nursing Homes promptly informed the Unions in writing that their unilateral effort to extend the date and time of the strike did not comply with Section 8(g) and that the Nursing Homes would consider the strike to be illegal if the Unions did not issue a new 10-day strike notice (Apdx. C-28, D-53).[1]

---

[1] The Nursing Homes also made an effort before the strike began to seek injunctive relief from the United States District Court for the Western District of Pennsylvania to prevent the threatened work stoppage, but the District Court declined to issue injunctive relief because it believe it lacked subject matter jurisdiction. Beverly Enterprises-Pennsylvania Inc. v. District 1199P Service Employees International Union, AFL-CIO, Case

Notwithstanding this written warning, the Unions conducted their three-day strike from April 1-4, 1996, with approximately 750 employees participating. (Apdx. C-28, D-48). During the strike, the Nursing Homes were obligated to make certain that their elderly and infirm residents continued to received proper medical care and daily living assistance. For that purpose, the Nursing Homes hired replacement workers. The Nursing Homes considered the strike to be illegal under Section 8(g), which meant the striking workers had no right to reinstatement and could even be discharged. However, when the strikers offered to return to work at the end of the strike, the Nursing Homes did not discharge them. Instead, the Nursing Homes retained the replacement workers and put all returning strikers on preferential rehire lists at the individual Nursing Homes where strikers had been employed. (Apdx. C-28, 29) This resulted in the immediate reinstatement of a large number of the strikers, though many were reinstated to shifts and working hours that were different from the schedules they had worked before the strike. (Id.). Those not promptly reinstated remained on the preferential rehire lists until vacancies occurred.

Despite these facts, National Labor Relations Board ("Board") issued an administrative complaint on July 8, 1996 asserting that the Nursing Homes committed an unfair labor practice by refusing to reinstate all strikers when they offered to return to work. Before an administrative hearing could be

---

No. 96CV00064j (W.D. Pa. 1997) (unpublished), affirmed 141 F.3d 1153 (Table) (3d Cir. 1998).

completed, the Board filed for injunctive relief in the United States District Court for the Western District of Pennsylvania under Section 10(j) of the National Labor Relations Act seeking, in relevant part: (1) immediate reinstatement of the former strikers who had not yet returned to work; (2) immediate discharge of any replacement workers currently holding positions sought by the reinstated strikers; and (3) the restructuring of shifts and scheduled workers hours of the strikers who were reinstated to positions different from the positions they held at the time of the strike. (Apdx. C-46).

Like an ordinary preliminary injunction under Fed. R. Civ. Proc. 65, an injunction under Section 10(j) is designed to provide interim relief until such time as the Board completes its administrative proceedings and related enforcement proceedings. In making its determination regarding the appropriateness of injunctive relief, however, the District Court did not use the traditional four-part test that federal courts routinely employ in injunction cases. This four-part test requires a moving party to establish, among other things, a likelihood of success on the merits. Instead, the District Court applied a two-pronged test that the Court of Appeals for the Third Circuit has specially developed for injunctive actions under Section 10(j). This test does not require the Board to establish any likelihood of prevailing on the merits.

On February 7, 1997, the District Court issued a Memorandum and Order (Apdx. C-10) granting the Board's Motion for Partial Summary Judgment on the "substantial and not frivolous" portion of the two-pronged test. The District

Court concluded that it was obligated to defer to the Board's legal theory regarding Section 8(g) without independently examining the basis for that legal theory (Apdx. C-22). The District Court felt constrained by Third Circuit jurisprudence to defer to the Board's theory despite its conclusion that the Board's legal theory was in conflict with the plain language of Section 8(g) ("I want to say this, I wouldn't resolve the statutory interpretation issue the way the Board did. I don't read the statute that way . . . .") (Apdx. D-56).

The District Court then held a hearing on the factual allegations and subsequently issued an injunction on April 4, 1997 requiring the Nursing Homes, in relevant part, to reinstate all strikers to their former positions. The Nursing Homes timely filed a Notice of Appeal, and the United States Court of Appeals for the Third Circuit took jurisdiction over the appeal pursuant to 28 U.S.C. § 1292(a)(1).[2] The Court of Appeals issued a Judgment Order on February 18, 1998 affirming the District Court's decision (Apdx. B-5). On March 26, 1998, Petitioners sought panel rehearing and rehearing in banc, but that request was denied by an Order dated July 2, 1998 (Apdx. B-3).

---

[2] On April 18, 1997, Petitioners filed with the Court of Appeals for the Third Circuit a Motion for Modification of Injunction During The Pendency of Appeal, but that motion was denied on April 28, 1997 (Apdx. B-8). On April 30, Petitioners filed an Application with this Court seeking modification to the injunction pending appeal (Application No. A-771), but the Application was denied by letter dated May 1, 1997 (Apdx. A-1).

ARGUMENT FOR ALLOWANCE OF THE WRIT

I. THIS COURT NEEDS TO RESOLVE THE DEEP SPLIT OF AUTHORITY AMONG THE COURTS OF APPEALS REGARDING THE STANDARD THAT DISTRICT COURTS MUST APPLY IN INJUNCTION PROCEEDINGS UNDER SECTION 10(j).

This Court has never issued a decision construing or applying Section 10(j) even though Section 10(j) has been a part of the NLRA for more than 50 years.[3] Section 10(j) is an extraordinary statutory provision that permits the Board to obtain full remedial relief for an alleged unfair labor practice despite the fact that the Board has not held an administrative hearing regarding the allegation. The statute confers jurisdiction on United States district courts to grant such temporary relief or restraining order as the courts deem "just and proper." 29 U.S.C. § 160(j). No NLRA provision defines "just and proper" and no NLRA provision places any restriction on the equitable discretion of the district courts.

A deep split of authority has developed among the Courts of Appeals regarding the standard that a district court must employ when determining whether injunctive relief is appropriate under Section 10(j). Consistent with the statutory language, the Courts of Appeals for the First, Second,

---

[3] Section 10(j) was added to the NLRA by amendment on June 23, 1947, c. 120, Title I § 101, 61 Stat. 146.

Seventh and Ninth Circuits, as well as the District Court for the District of Columbia Circuit, have concluded that the propriety of injunctive relief under Section 10(j) should be determined in accordance with the familiar four-part test that federal courts routinely use to determine whether injunctive relief is just and proper. Pye v. Sullivan Bros. Printers, Inc., 38 F.3d 58, 63 (1st Cir. 1994); Miller v. California Pacific Medical Center, 19 F.3d 449, 457 (9th Cir. 1994); Kinney v. Pioneer Press, 881 F.2d 485, 490 (7th Cir. 1989); Kaynard v. Mego Corp., 633 F.2d 1026, 1023 (2nd Cir. 1980); D'Amico v. U.S. Service Industries, Inc., 867 F. Supp. 1075 (D. D.C. 1994). This four-part test requires the moving party to establish: (1) a likelihood of success on the merits; (2) the potential for irreparable injury in the absence of an injunction; (3) that such injury outweighs any harm that an injunction would inflict on the party opposing the injunction; and (4) that the injunction sought is in the public interest. Sullivan Bros, 38 F.3d at 63.

In direct contrast, the Courts of Appeals for the Third, Fifth, Sixth, Tenth and Eleventh Circuits have rejected the four-part test and have created a significantly reduced two-pronged approach. Dowd v. Intern. Longshoremen's Ass'n, AFL-CIO, 975 F.2d 779 (11th Cir. 1992); Gottried v. Frankel, 818 F.2d 485, 495 (6th Cir. 1987); Kobell v. Suburban Lines, Inc., 731 F.2d 1076, 1084-1089 (3rd Cir. 1984); Boire v. Freight Carriers, Inc., 515 F.2d 1185, 1189-1193 (5th Cir. 1975); Angle v. Sacks, 382 F.2d 655, 660 (10th Cir. 1967).

The first part of the two-part test requires only that the

Board establish "reasonable cause" to believe that a violation of the NLRA has occurred. In the Third Circuit, this "reasonable cause" prong itself has been divided into two separate inquiries. A district court must first determine whether the legal theory that underlies the Board's unfair labor practice allegation is "substantial and not frivolous." Suburban Lines, 731 F.2d at 1088-1089. If the Board's legal theory meets this minimal requirement, the court then must determine whether the Board has demonstrated sufficient facts which, if true, would support an unfair labor practice finding under the legal theory presented , and the district court must view the facts in the light most favorable to the Board and without resolving credibility issues that may be raised by the evidence. Hirsch v. Corban Corporations, Inc., 949 F. Supp. 296, 299 (E.D. Pa. 1996). The Board's burden under the first prong of the test has been characterized by the Court of Appeals for the Third Circuit as being "relatively insubstantial." Suburban Lines, 731 F.2d at 1084.

The second prong of the test requires the Board to prove that temporary injunctive relief is "just and proper." Within the Third Circuit, the critical inquiry under this prong of the test is whether the requested relief is necessary to protect the collective bargaining process and necessary to preserve the Board's ability to ultimately exercise its remedial powers. Pascarell v. Vibra Screw, Inc., 904 F.2d 874, 878-879 (3rd Cir. 1990).[4]

---

[4] In the remaining two Circuits, the test for obtaining injunctive relief under Section 10(j) is less clear. The Court of

II. THE EXISTING SPLIT OF AUTHORITY AMONG THE CIRCUITS POSES AN IMPORTANT QUESTION REGARDING THE POWER OF FEDERAL COURTS TO GRANT OR WITHHOLD EQUITABLE RELIEF FOR ALLEGED VIOLATIONS OF THE NLRA.

The threshold inquiry in any injunction proceeding is whether the moving party has met its "burden" under the applicable legal standard, and the outcome of an injunction proceeding often is controlled by how the moving party's "burden" is defined. There is an important substantive difference between the four-part test and the two-pronged test

---

Appeals for the Fourth Circuit has not issued a decision, under Section 10(j), and the district courts within the Fourth Circuit disagree as to the appropriate test. Compare Johnston v. J.A. Hackney & Sons, Inc., 300 F. Supp. 375, 379-380 (E.D. N.C. 1969) (applying the four-part test) with D'Amico v. Cox Creek Refining Co., 719 F. Supp. 403, 407 (D. Md. 1989) (applying the two-pronged approach). The Court of Appeals for the Eighth Circuit issued a decision in 1967 adopting a two-pronged approach, but it emphasized that the "just and proper" prong includes analysis of the full panoply of equitable criteria that district courts regularly consider in injunction proceedings. Minnesota Mining and Mfg. Co. v. Meter, 385 F.2d 265, 272 (8th Cir. 1967). A recent District Court decision within the Eighth Circuit construed Minnesota Mining as being consistent with the decisions of the Courts of Appeals for the First, Second, Seventh and Ninth Circuits which employ the traditional four-part test for injunction proceedings. Sharp v. Koronis Parts, Inc., 927 F. Supp. 1208, 1210 (D. Minn. 1996).

with regard to the moving party's burden under Section 10(j). Under the four-part test, the moving party bears the burden of establishing a **likelihood** of success on the merits. This high standard is appropriate because of the extraordinary nature of the order that the moving party is seeking from the court prior to a full hearing on the merits of a moving party's claim.[5] The two-pronged test, on the other hand, sets a "relatively insubstantial" burden, as the Court of Appeals for the Third Circuit has candidly acknowledged. Suburban Lines, 731 F.2d at 1084. The Board's factual allegations are presumed to be true and cannot be rebutted by the opposing party. The Board's legal theory need only have some non-frivolous basis in law in order to be deemed "substantial and not frivolous." As a result, even though Congress did not provide lower standards for injunction proceedings brought under Section 10(j) than for injunctions generally, the Board can obtain injunctive relief under the two-pronged test even when a District Court concludes that there is very little likelihood that the Board's General Counsel will prevail at the end of the administrative process and any related enforcement proceedings.

The present case is a prime example of the profound injustice that can occur when the two-pronged test is

---

[5] As the Court of Appeals for the First Circuit has noted, since "the interim relief sought by the Board is essentially the final relief sought, the likelihood of success should be **strong**." Sullivan Bros., 38 F.3d at 63 (emphasis in original) quoting from Asseo v. Pan American Grain Co., Inc., 805 F.2d 23, 29 (1st Cir. 1986)

employed. Section 8(g) of the NLRA requires a union to give a health care institution ten-days notice of the precise date and time of any strike so that the health care institution can arrange for the continued and uninterrupted care of its patients. It similarly requires a union to obtain the written agreement of the health care institution for any extension of the strike deadline. Here, the Unions unilaterally extended the date and time of their strike by three days (from Friday to Monday) without the written agreement of the Nursing Homes (indeed, over the Nursing Homes strong objections). Nevertheless, the Board sought and obtained an injunction under the two-pronged test even though the Board's legal theory had no "likelihood of success on the merits."

The District Court recognized that the Board's legal theory contradicts Section 8(g)'s unambiguous statutory language delineating the circumstances in which a strike notice may be extended. The District Court stated:

> "I want to say this, I wouldn't resolve the statutory interpretation issue the way the Board did. I don't read the statute that way . . ."

(Apdx. D-56). The District Court nonetheless granted an injunction because:

> "Third Circuit authority fails to reveal any inclination to abandon the reasonable cause/just and proper inquiry . . . (and) interim relief under Section 10(j) may be granted 'without the showing of irreparable harm and

> a likelihood of success on the merits, which are the ordinary requisites'. . . . '[T]he Regional Director as a plaintiff, has a very low threshold to meet his or her burden of proof.' As a District Court, I am not free to follow the lead of other courts of appeals when their jurisprudence on a point is at variance with Third Circuit decisions. Because I conclude that the reasonable cause/just and proper inquiry is alive and well in this circuit, I decline Beverly's invitation to replace it with traditional equity principles."

(Apdx. C-40, 41), quoting from Suburban Lines, 731 F.2d at 1078, and the concurring opinion of Judge Aldisert in Suburban Lines, 731 F.2d at 1095.

If the District Court had been free to apply the four-part test that it customarily would use for injunction cases, the District Court plainly would have concluded that the Board's legal theory was not likely to prevail on the merits. Instead, the District Court's equitable discretion was restricted by the two-pronged approach, which required the District Court to issue the injunction so long as the Board's legal theory was not frivolous.

Worse than that, because the Third Circuit has characterized the Board's burden under the "reasonable cause" prong as being "relatively insubstantial", the District Court held that it was precluded from undertaking **any** examination of the statutory language of Section 8(g) "to

determine the substantiality of the Board's legal theory" (Apdx. C-22). The District Court expressed concern that, if it determined that the Board's legal theory was contrary to the statute, such a determination "would be tantamount to a decision on the merits of the unfair labor practice charge pending before the Board" (Id).

By declining to examine the Board's legal theory, the District Court abdicated its judicial function under Article III of the Constitution and acted as a rubber stamp for the Board's injunction request. American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 318, 85 S. Ct. 955, 967 (1965) ("The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress."). The District Court never required the Board to demonstrate in this case that its legal theory was substantial and not frivolous because the Court concluded that any determination adverse to the Board would undermine the Board's legal position in the pending administrative proceeding. The Court of Appeals adopted this analysis without comment. Therefore, as a practical matter, the "reasonable cause" prong of the Third Circuit's two-pronged test is meaningless because the Board will automatically clear this hurdle in each case without any critical analysis by the applicable district court.

III. THE CREATION OF A TWO-PRONGED TEST FOR SECTION 10(j) PROCEEDINGS CONTRADICTS THIS COURT'S HOLDINGS IN ROMERO-BARELO AND HECHT CO.

The Third Circuit's two-pronged approach narrowly constricts a District Court's exercise of traditional equitable discretion. As a result, the Third Circuit's approach directly contradicts the Supreme Court's holdings in Weinberger v. Romero-Barcelo, 456 U.S. 305, 313, 102 S. Ct. 1798, 1803 (1982) and Hecht Co. v. Bowles, 321 U.S. 321, 64 S. Ct. 587 (1944). Both Romero-Barcelo and Hecht Co. involved efforts by federal government agencies to obtain injunctive relief under the authority of a federal statute.[6] The Court held in each of these cases that, when the moving party seeks an injunction under the authority of a federal statute, district courts must exercise the full range of their equitable powers unless the language of the governing statute clearly and inescapably requires the district courts to limit their

---

[6] In Romero-Barcelo, the statute was the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*, which authorized the Administrator of the Environmental Protection Agency to seek injunctive relief for various violations of the Act, 33 U.S.C. § 1319(b). (Romero-Barcelo, 456 U.S. at 317-318, 102 S. Ct. at 1805-1806). Similarly, in Hecht Co., the relevant statutory language was Section 205(a) of the Emergency Price Control Act of 1942, 56 Stat. 23, 50 U.S.C.A. App. Supp. II, Sections 901 *et seq.*, 925, which authorized the Price Administrator to seek injunctive relief to all violations of the Act. Hecht Co., 321 U.S. at 321-322, 64 S. Ct. at 588.

consideration of the traditional equitable criteria that are analyzed through the customary four-part test employed by district courts in injunction actions. Romero-Barcelo, 456 U.S. at 313, 102 S. Ct. at 1803; Hecht Co., 321 U.S. at 329-330, 64 S. Ct. at 592.

The Court's opinion in Romero-Barcelo is particularly instructive on this point. The Court emphasized that district courts traditionally have considered a wide range of equitable criteria when balancing the competing rights of parties who seek and oppose injunctive relief, and the Court then stated:

> These common place considerations applicable to cases in which injunctions are sought in the federal courts reflect a "practice with a background of several hundred years of history", Hecht Co. v. Bowles, supra, at 329, 64 S. Ct. at 591-92, a practice of which Congress is assuredly well aware. Of course, Congress may intervene and guide or control the exercise of the court's discretion, but we do not lightly assume that Congress has intended to depart from established principles. Hecht Co. v. Bowles, supra, at 329, 64 S. Ct. at 591. As the Court said in Porter v. Warner Holding Co., 328 U.S. 395, 398, 66 S. Ct. 1086, 1089, 90 L. Ed. 1332 (1946): "Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid

> legislative command. Unless a statute in so many words, or by necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. 'The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.' Brown v. Swann, 10 Pet. 497, 503 [9 L. Ed. 508] . . ."

Romero-Barcelo, 456 U.S. at 313, 102 S. Ct. at 1803-1804.

The Court's holdings in Romero-Barcelo and Hecht Co. apply with equal force to injunction actions brought under Section 10(j) of the NLRA. Section 10(j) vests federal courts with "jurisdiction to grant the Board such temporary relief or restraining orders as it deems **just and proper**." 29 U.S.C. § 160(j) (emphasis added). The four-part test that federal courts routinely use in injunction actions is specifically designed to provide district courts with a framework for determining when injunctive relief is "just and proper." The language in Section 10(j) does not restrict a district courts' equitable discretion and plainly does not contain clear and unmistakable language requiring some reduced standard in injunction actions under Section 10(j).

The Courts of Appeals for the Seventh and Ninth Circuits relied heavily on Romero-Barcelo when they returned to the four-part test and overruled their prior decisions that had applied the two-pronged approach to injunction actions under Section 10(j). Miller v. California

Pacific Medical Center, supra, 19 F.3d at 457, overruling Scott v. El Farra Enters., Inc., 863 F.2d 670 (9th Cir. 1988) and Aguayo v. Tomco Carburetor Co., 853 F.2d 744 (9th Cir. 1988); Kinney v. Pioneer Press, supra, 881 F.2d at 491 overruling Squillacote v. Graphic Arts International Union, 540 F.2d 853 (7th Cir. 1976) and Squillacote v. Graphic Arts International Union, 513 F.2d 1017 (7th Cir. 1975). Similarly, the District Court for the District of Columbia relied heavily upon Romero-Barcelo and Hecht Co. when it rejected the two-prong approach and concluded that there is "no reason to depart from the traditional test of equitable relief under the just and proper language of Section 10(j) unless Congress had expressly, or by inescapable inference, otherwise sought to control the exercise of the court's discretion, which it has not done." D'Amico v. U.S. Service Industries Inc., supra, 867 F Supp. at 1084. Significantly, no Court of Appeals has ever issued a decision asserting that this Court's holdings in Romero-Barcelo and Hecht Co. do not apply with equal force to actions brought under Section 10(j) of the NLRA.

The statutory language of Section 10(j) does not mandate a two-pronged reasonable cause/just and proper analysis. Indeed, the phrase "reasonable cause" does not appear anywhere in Section 10(j) and, instead, has been imported by certain Courts of Appeals into the Section 10(j) analysis from statutory language in a different section of the NLRA -- namely, Section 10(l), 29 U.S.C. § 160(l).[7] Unlike

---

[7] Section 10(l) provides, in relevant part:

Section 10(j), which leaves it to the discretion of the Board whether to seek injunctive relief, Section 10(l) expressly mandates that the Board petition for injunctive relief prohibiting the conduct listed in Section 10(l). Given this statutory language, the reasonable cause prong has statutory importance in Section 10(l) since the Court must determine whether the Board has met this statutory prerequisite for injunctive relief.

Unlike Section 10(l), Section 10(j) "erects no hurdle for the Board to jump over before petitioning the court for

---

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of Section 4(A), (B), or (C) or Section 8(b) or Section 8(e) or Section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has **reasonable cause** to believe such charge is true and that a complaint should issue, he **shall**, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred or is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon filing of any such petition, the District Court shall have jurisdiction to grant such injunctive relief for a temporary restraining order **as it deems just and proper**, notwithstanding any other provision of law . . . ."

29 U.S.C. § 160(l) (emphasis added).

interim relief." Miller, supra, 19 F.3d at 456. Since Congress did not include such language in Section 10(j), there is no legitimate basis for inferring such a requirement from Section 10(l), and doing so is directly contrary to this Court's holdings in Romero-Barcelo and Hecht Co..

IV. THE BOARD'S LEGAL THEORY IN THIS CASE IS GROUNDLESS, AND THE BOARD IS NOT LIKELY TO PREVAIL ON THE MERITS OF ITS CLAIM.

The Board's legal theory here cannot withstand scrutiny under either the traditional four-part test or the Third Circuit's specially-created two-pronged test. The Board's legal theory turns upon the construction of the statutory language in Section 8(g) of the NLRA. The legal question is whether Section 8(g) permits a union to unilaterally extend the date and time of an announced strike without the written agreement of the affected employer. The last sentence in Section 8(g) squarely answers this question by stating unambiguously: "The notice, once given, may be extended by the written agreement of both parties." 29 U.S.C. § 158(g). Notwithstanding this clear language, the Board has construed Section 8(g) so as to permit a Union to unilaterally extend a strike notice by up to 72 hours without the need for any agreement by the employer. Bio-Medical Applications of New Orleans, Inc., 240 NLRB 432 (1979).

In Chevron U.S.A. v. Natural Resources Defense

Council, Inc., 467 U.S. 837, 842, 104 S. Ct. 2778, 2782 (1984), this Court established the set of standards to be used by federal courts when reviewing an administrative agency's construction of that agency's own governing statute. A federal court must first determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id., 467 U.S. at 842-843, 104 S. Ct. at 2781. On the other hand, if Congress has not spoken to the precise question at issue, then the federal court must determine whether the administrative agency's construction of the statute is a permissible and reasonable one. Id., 467 U.S. at 843, 104 S. Ct. at 2782. This Court emphasized that federal courts are the final authority on issues of statutory construction and that federal courts must reject administrative constructions that are contrary to statutory language. Id., at n. 9.

The present case is one of the clearest possible examples of a statute having "directly spoken to the precise question at issue." Id., 467 U.S. at 842, 104 S. Ct. at 2781. Congress specifically mandated in Section 8(g) that any extension of a strike notice be done through the written agreement of both parties, and this statutory language prohibits a union from **unilaterally** extending the date and time of a strike by three days. Absent the written agreement of both parties, the Union's only option is to issue a new ten-day strike notice.

The fundamental purpose of Section 8(g) is to make certain that healthcare institutions have ten-days' notice of the precise date and time of a strike so that those health care institutions can ensure that a strike does not endanger the lives, medical services, or essential needs of patients in health care institutions. Walker Methodist Residence and Healthcare Center, Inc., 227 NLRB 1630, 1631 (1977); NLRB v. Stationary Engineers, Local 39, 746 F.2d 530, 533 (9th Cir. 1984); NLRB v. Washington Heights-West Harlem-Inwood Mental Health Council, Inc., 897 F.2d 1238, 1247 (2nd Cir. 1990). By requiring the mutual agreement of both parties for any extension of a ten-day notice, Section 8(g) guarantees that a health care institution will have adequate time to adjust its strike preparation plans to arrange coverage for all patients at the new date and time of the strike. If the health care institution cannot make adequate alternative arrangements, then it can refuse to extend the strike date, and the union then needs to send the employer a new ten-day notice under Section 8(g).

In Bio-Medical, supra, 240 NLRB at 435, the Board created a 72-hour exception to the requirements of Section 8(g). The Board sought to justify this exception in two ways. First, the Board asserted that the last sentence of Section 8(g) was ambiguous because it provided: "The notice, once given, **may** be extended by the written agreement of both parties." 29 U.S.C. § 158(g) (emphasis added). The Board concluded that Congress' use of the word "may" meant that the written agreement of the parties was not the "exclusive manner of

extending an initial strike date" and that Congress' intent was to allow unions a reasonable time to unilaterally extend strike notices. Bio-Medical, 240 NLRB at 434. This "construction" of the statute defies common sense and defies well established principles of statutory construction.

Section 8(g)'s use of the "may" simply means that the parties can mutually agree to extend the strike date if they so choose, but they are not forced to do so. The construction that the Board seeks to give to Section 8(g) would make the last sentence of Section 8(g) meaningless. If "may" had been intended by Congress to mean that "the written agreement of both parties" was only one of many ways in which a strike notice could be extended, then the last sentence of Section 8(g) is completely superfluous. Giving Section 8(g) such a construction contradicts the well-established maxim of statutory construction that courts should "hesitate to treat as surplusage a statutory term in any setting . . . ." Bailey v. U.S., 516 U.S. 137, 116 S. Ct. 501, 506-507 (1995) quoting from Ratzlaf v. U.S., 510 U.S. 135, 114 S. Ct. 655, 659 (1994). Contrary to the Board's legal theory, the word "may" does not create any ambiguity in the statute and does not grant the Board any freedom to create exceptions that are contrary to the plain language of the statute.

Second, the Board argued in Bio-Medical, that a 72-hour exception was justified by certain Senate and House Commission Reports, which stated :

> Thus, it would be unreasonable, in the Committee's judgment, if a strike or picketing

> commenced more than 72 hours after the time specified in the notice. In addition, since the purpose of the notice is to give a health care institution advanced notice of the actual commencement of a strike or picketing, if a labor organization does not strike at the time specified in the notice, at least 12 hours notice should be given of the actual time for commencement of the action.

S. Rept 93-766, 9 3d Cong., 2d Sess. 4; H. Rep. 93-1051 90 3d Cong., 2d Sess. 3. See, Bio-Medical, 240 NLRB at 434, n. 8. The Board also relied on the joint remarks of two Congressmen who supported the House Committee Report's position. Id.

The Board's reliance on these snippets of legislative history as a basis for ignoring the unambiguous statutory language of Section 8(g) is insupportable and transgresses this court's frequently repeated insistence that the Board abide by the language of the NLRA and not seek to circumvent statutory language by relying on committee reports and similar legislative history that were not enacted into law:

> The Act is to be enforced according to its own terms, not by creating legal categories inconsistent with its meaning, as the Board has done in nurse cases. Whether the Board proceeds through adjudication or rulemaking, the statute must control the Board's decision, not the other way around. * * * It is the

> function of the Court and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means.

NLRB v. Health Care & Retirement Corp. of America, 511 U.S. 571, 114 S Ct. 1778, 1783-1784 (1994).

> It is not necessary for us to justify the policy of Congress. It is enough that we find it a statute. That policy cannot be defeated by the Board's policy, which would make an unfair labor practice out of that which is authorized by the statute . . . . To sustain the Board's contention would be to permit the Board under the guise of administration to put limitation in the statute not placed there by Congress.

Colgate-Palmolive-Peet Co. v. NLRB, 338 U.S. 355, 362, 70 S. Ct. 166 (1949). See also, U.S. American College of Physicians, 475 U.S. 834, 106 S. Ct. 1591, 1598 (1986) ([D]espite the [Committee] Reports' seeming endorsement of a per se rule, we are hesitant to rely on that inconclusive legislative history, either to supply a provision not enacted by Congress . . . or to define a statutory term enacted by a prior Congress"); Hirschey v. F.E.R.C., 777 F.2d 1, 7-8 (D.C. Cir. 1985) (then Circuit Judge Scalia, concurring) (discussing the unreliability of committee reports and the importance of judicial construction of statutory language without resort to legislative history).

Section 8(g) was added to the NLRA as part of the 1974 Non-Profit Hospital Amendments to the Labor Management Relations Act, and it was a delicate compromise achieved only after lengthy negotiations between members of Congress themselves and between Congress and the Executive Branch, as well as hospital associations, labor representatives and other interest groups. See, 120 Cong. Rec. 16899 (May 30, 1974) (remarks of Representative Thompson).[8] As a result, the legislative history relied on by

---

[8] The history of artful compromises and outright dealmaking that was necessary to secure passage of the health care amendment is described quite well in International Broth. of Elec. Workers, Local Union No. 474 v. NLRB.,814 F.2d 697, 700-701, 710-715 (D.C. Cir. 1987). The concurring opinion of Circuit Judge Buckley is particularly instructive regarding the rank political purposes of the various committee reports.

"[T]here can be little doubt that the two committees expected the Board to pay attention to their directive -- not because it had the force of law, but because agencies are not given to ignoring the commands of potentates who control their budgets and oversee their operations. . . . This political reality is well understood by professionals. . . Thus, inclusion of the admonition in the committee reports could be expected to provide the margin of assurance required to secure the sport of at least some of the legislators and lobbyists who were concerned over the prospect of proliferating bargaining units. . .[T]hese political and legislative considerations (make) it necessary for judges to exercise extreme caution before concluding that a statement made in floor debate, or at a hearing, or printed in a committee report may be taken as statutory gospel. Otherwise, they run the risk of reading authentic insights into remarks intended to serve quite different purposes." Id., 814 F.2d at 816.

the Board is, if anything, evidence **against** the Board's construction of Section 8(g) because it demonstrates that some members of Congress sought a broader interpretation of Section 8(g) but those members could not obtain sufficient support to include the proposed 72-hour exception in the actual enacted language of Section 8(g).[9]

In light of the insubstantial basis for the Board's legal theory in Bio-Medical, it is not surprising that the Board's construction of Section 8(g) has never been approved or sanctioned by any Court of Appeals. The Bio-Medical decision itself was not challenged in any Court of Appeals. The only subsequent Board decision that relied on Bio-Medical, and that was subject to federal court review, was denied enforcement by the United States Court of Appeals for the Second Circuit. NLRB v. Washington Heights-West Harlem-Inwood Mental Health Council, Inc., 897 F.2d at 1247, denying enforcement to Washington Heights-West Harlem Inwood Mental Health Council, Inc., 289 NLRB 1122 (1988).

---

[9] Indeed, Senator Fannin specifically noted during the debate on Section 8(g) that the Senate Committee Report "in many respects is a curious document [because] there is an obvious intent to substitute the intent of the Senate for the words of the law." 120 Cong. Rec. 12994 (May 2, 1974). Senator Fannin noted several instances in which the report expressed "the sense of the Committee" -- including the issue of Unions unilaterally extending their strike notices -- and Senator Fannin repeatedly asked: "Why not put it in the law itself? If the words of the law are clear, courts do not look to Congressional intent". Id.

In Washington Heights, the Board found a Union's strike to be lawful under Section 8(g) even though the Union unilaterally delayed the strike for one day without notice to the health care institution. The Board concluded that the Union's failure to give any notice was not important since the health care institution was prepared for the strike, and the Board also concluded that the Union's strike was an unfair labor practice strike and, as such, was exempt from Section 8(g). In holding that unfair labor practice strikes were exempt from Section 8(g), the Board relied upon the same legislative history that it relied upon in crafting its extra-statutory "72-hour exception".

The Second Circuit expressed strong doubt concerning the Board's legal theory that a Union may unilaterally extend the date and time of its strike notice without the written agreement of both parties. The Court stated:

> We are not . . . at liberty to depart from the straightforward unambiguous language of the statute requiring the Union to specify in writing the date and time it would strike. Furthermore, we are convinced that the notice requirement is appropriately read strictly. At a health care institution, disruption in patient care of even a few hours may cost lives. 'Strict adherence to notice requirements is essential in the area of health care institutions, in light of Congress' concern `that sudden, massive strikes could endanger the lives and

health of patients. . . .'" NLRB v. Stationary Engineers Local 39, 746 F.2d 530, 533 (9th Cir. 1984) (citation omitted).

Washington Heights, 897 F.2d at 1247. The Second Circuit found it unnecessary, however, to directly rule on the Board's construction of Section 8(g) since, even under the Board's construction, a Union must provide at least 12 hours of supplementary notice, and the Union in that case had failed to do so.

It is significant, however, that when the Second Circuit later in the same decision rejected the Board's holding that unfair labor practice strikes were exempt from Section 8(g), the court did so because it concluded that the Board improperly relied on legislative history rather than the precise language of Section 8(g). The Court stated:

> We have doubts about the force of this legislative history. This [Committee] language carves an explicit exception to the notice requirement. . . . Where the full Congress has not done so, we cannot create an exception to the Act. [We] are somewhat hesitant to give this legislative history effect, because it not so much guides interpretation of ambiguous wording in the statute, but rather, creates a significant exception. * * * Section 8(g) notice protects the interest of third parties for whom an unanticipated work stoppage may be a life-or-death matter. We are

> reluctant to conclude that the full Congress intended to sacrifice the safety of the sick or dying to help labor organizations and health care institutions avoid a 10-day delay in going on strike.

Washington Heights, 897 F.2d at 1247-48. The court's criticism in this regard is equally applicable to the Board's "72-hour" exception, which has no source in Section 8(g).

CONCLUSION

The writ requested should issue because this case involves serious and substantial issues which divide the Courts of Appeals regarding the proper standard for issuance of injunctions under Section 10(j) of the NLRA and these issues are the type that are frequency reoccurring in federal district courts. These issues include: (1) should district courts employ the traditional four-part test or the specially-created two-pronged test in evaluating 10(j) injunction requests; (2) to what extent are the "equitable" standards of Fed. R. Civ. Proc. 65 applicable to 10(j) injunction requests, or is the Board (and/or other federal agencies) exempt from these general requirements; and (3) are district courts required to defer to a legal theory of the Board that contradicts the plain language of the NLRA, under either the four-part test or the two-pronged test.

Respectfully submitted,

LITTLER MENDELSON, P.C.
*Warren M. Davison
Thomas P. Dowd
The World Trade Center, Suite 1653
Baltimore, Maryland 21202-3005
(410) 528-9545

Attorneys for the Petitioners
**Counsel of Record*.

Dated: September 16, 1998

APPENDIX A

SUPREME COURT
OF THE
UNITED STATES OF AMERICA

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

May 1, 1997

Mr. Warren Davison
The World Trade Center
Suite 1653
Baltimore, MD 21202-3005

Re: Beverly Health and Rehabilitation Services, Inc., et al. v. Gerald Kobell, et al., Application No. A-771

Dear Mr. Davison:

The application for a stay of injunction pending appeal in the above-entitled case has been presented to Justice Souter, who on May 1, 1997 denied the application.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By Christopher W. Vasil
Christopher W. Vasil
Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 97-3200 and 97-3357

GERALD KOBELL, ET AL.
Appellee in No. 97-3200
Appellant in No. 97-3357

v.

BEVERLY HEALTH AND REHABILITATION
SERVICES, INC.
Appellants in No. 97-3200
Appellees in No. 97-3357

SUR PETITION FOR REHEARING

BEFORE: BECKER, Chief Judge, SLOVITER, STAPLETON, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, McKEE, and RENDELL, Circuit Judges, and POLLAK,* District Judge

---

*Hon. Louis H. Pollak, Senior U. S. District Judge for the Eastern District of Pennsylvania, was a member of the original panel. His vote is limited to panel rehearing only.

The petition for rehearing filed by appellants Beverly Health and Rehabilitation Services, Inc., et al., in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the court,

/s/
Circuit Judge

DATED: JUL 2, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 97-3200 and 97-3357

GERALD KOBELL, REGIONAL DIRECTOR FOR
REGION SIX OF THE NATIONAL LABOR
RELATIONS BOARD FOR AND ON BEHALF OF THE
NATIONAL LABOR RELATIONS BOARD

Appellee in No. 97-3200
Appellant in No. 97-3357

v.

BEVERLY HEALTH AND REHABILITATION
SERVICES, INC., ITS OPERATING REGIONAL
OFFICES, WHOLLY-OWNED SUBSIDIARIES AND
INDIVIDUAL FACILITIES AND EACH OF THEM,
AND/OR ITS WHOLLY-OWNED SUBSIDIARY;
BEVERLY ENTERPRISES-PENNSYLVANIA, INC.,
d/b/a BEVERLY MANOR OF MONROEVILLE
d/b/a CLARION CARE CENTER
d/b/a FAYETTE HEALTH CARE CENTER
d/b/a GRANDVIEW CARE CENTER
d/b/a HAIDA MANOR
d/b/a MEADVILLE CARE CENTER

d/b/a MEYERSDALE MANOR
d/b/a MT. LEBANON MANOR CONVALESCENT CENTER
d/b/a MURRAY MANOR
d/b/a RICHLAND MANOR
d/b/a WILLIAM PENN NURSING CENTER
d/b/a BEVERLY MANOR OF READING
d/b/a BEVERLY MANOR OF LANCASTER
d/b/a BLUE RIDGE HAVEN CONVALESCENT CENTER WEST
d/b/a CALEDONIA MANOR
d/b/a CAMP HILL CARE CENTER
d/b/a CARPENTER CARE CENTER
d/b/a STROUD MANOR
d/b/a YORK TERRACE NURSING CENTER

Appellants in No. 97-3200
Appellees in No. 97-3357

On Appeal from the United States District Court For the
Western District of Pennsylvania
(D.C. Civil Action No. 96-cv-01280)
District Judge: Honorable D. Brooks Smith

Argued January 23, 1998

BEFORE: BECKER,* Chief Judge, STAPLETON Cir. Judge and POLLAK,** District Judge

---

JUDGMENT ORDER

After consideration of the contentions raised by appellants in No. 97-3200 and appellant in No. 97-3357, it is

ORDERED AND ADJUDGED that the judgments of the district court entered April 7, 1997, be and the same are hereby affirmed.

Cost taxed against appellants in No. 97-3200 and against appellant in No. 97-3357.

By the Court,

/s/ Walter K. Stapleton

Circuit Judge

ATTEST:

/s/ P. Douglas Sisk

P. Douglas Sisk, Clerk

DATED: FEB 18, 1998

---

*Chief Judge as of February 1, 1998.

**Hon. Louis H. Pollak, Senior U. S. District Judge for the Eastern District of Pennsylvania, was a member of the original panel. His vote is limited to panel rehearing only.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

E-53-E
April 23, 1997

No. 97-3200

GERALD KOBELL, et. al.
v.
Beverly Health and Rehabilitation
Services, Inc.,
Appellant

(D.C. Civil No. 96-cv-01280 DBS)

PRESENT: SCIRICA AND NYGAARD, Circuit Judges

1. Motion by Appellants Beverly Health et al for modification of injunction during the pendency of appeal.
2. Brief in support of motion for modification of injunction.
3. Motion for leave to file amicus submission on emergent motion for stay by Hospital and Healthsystem Association of PA. (With Attachment)
4. Opposition by the NLRB to appellant's motion for modification of injunction pending appeal.

5. Opposition by the NLRB to motion of Hospital Healthsystem for Leave to file amicus submission.

6. Motion for leave for oral argument on motion for modification of injunction during pendency of appeal.

Emergency Date is May 5, 1997
Response due April 23, 1997 at 12:00 AM

/s/ Susan M. Acerba
Susan M. Acerba 597-3014
Case Manager

ORDER

The motion by appellants Beverly Health, et al. for modification of injunction during the pendency of appeal is denied.

The motion for leave for oral argument is moot.

The motion for leave to file amicus submission on emergency motion for stay by Hospital and Healthsystem Association of PA is granted.

By the Court,

/s/
Circuit Judge

Dated: April 28, 1997

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GERALD KOBELL, Regional Director for Region Six of the National Labor Relations Board, Plaintiff	)	
vs.	)	Civil Action No. 96-1280
BEVERLY HEALTH AND REHABILITATION SERVICES, INC., et al., Defendants	)	

MEMORANDUM

SMITH, District Judge

I. Introduction

On July 8, 1996, Gerald Kobell, Regional Director for Region Six of the National Labor Relations Board (hereinafter the Board), filed a Complaint and Motion for Injunctive Relief against Beverly Health and Rehabilitation Services, Inc., against some of its subsidiaries, and against twenty health care facilities it operates in the Commonwealth

of Pennsylvania (hereinafter referred to collectively as Beverly). The Board sought interim relief under section 10 (j), 29 U. S. C. § 160 (j), of the National Labor Relations Act (NLRA), pending final disposition by the Board of unfair labor practice charges filed by employees of the twenty Beverly health care facilities. Docket no. 1. The parties have filed cross-motions for partial summary judgment which require determining whether the Board's legal theory regarding notice under § 8(g) of the NLRA is "substantial and not frivolous." Docket nos. 18 and 27.

II. Facts and Procedural History

Beverly owns and operates over 750 health care facilities nationwide which provide care for elderly or infirm individuals. The service and maintenance employees at twenty of these health care facilities in Pennsylvania are unionized. Docket no. 19, ¶3. The most recent collective bargaining agreements expired on November 30, 1995, except at two of the facilities where the agreements expired on December 31, 1994. Docket no. 19, ¶5.

Despite the expiration of the collective bargaining agreements, the unionized staff continued to work while negotiations proceeded. The unionized employees complained that certain changes at the health care facilities where they worked violated their rights under the NLRA to engage in concerted activity. The following examples represent some of the alleged violative conduct by Beverly:

removal of union bulletin boards; denial of established access, at the respective facilities, of union representatives to union members; changes in health care insurance; reduction in work hours; unilateral changes in employee policies; denial of information relevant to contract negotiations; prohibitions against wearing union insignia; and prohibitions against bringing union literature onto the premises. It is also alleged that Beverly had direct contact with unionized employees in an effort to influence them concerning their continued affiliation with the union. Docket no. 1. These alleged unfair labor practices resulted in the filing of numerous charges with the Board against Beverly. See docket no. 1. Thereafter, the unions voted to authorize strikes at fifteen of the facilities.

On or about March 15, 1996, the unions gave notice to the fifteen facilities of their intent to engage in an unfair labor practice strike commencing at 7:00 A.M. on Friday, March 29, 1996. The notice specifically stated that the written notice was being served as required by § 8(g) of the NLRA, enacted as part of the 1974 Nonprofit Hospital Amendments to the Labor Management Relations Act. 29 U.S.C. §158(g). Docket no. 18, exh. A.

On March 27, 1996, the unions gave an additional notice to the fifteen facilities, this time advising of their intent to extend the commencement of the strike from Friday, March 29, 1996 at 7:00 A.M. to Monday, April 1, 1996 at 6:00 A.M. It is undisputed that Beverly did not consent, either orally or in writing, to this 71 hour extension.

The unions were advised by Beverly that the extension notice failed to fulfill the literal statutory requirements set forth in §8 (g) , and that it would consider unlawful any strike held pursuant to the seventy-one hour extension notice. Despite Beverly's lack of consent, a strike began on April 1, 1996 at the fifteen facilities, and continued until April 4, 1996 at about 7:00 A.M.

On the first day of the strike, Beverly sought injunctive relief from this court in a separate civil action claiming that the extension of the strike notice violated the extension requirements of §8(g). Beverly Enterprises - Pennsylvania Inc. et al. v. District 1199P, Service Employee International Union. AFL-CIO et al., Civil Action No. 96-64J (W.D. Pa.). I denied a request for a temporary restraining order, and Beverly withdrew its request for preliminary injunctive relief. Thereafter, in December 1996, I dismissed Beverly's complaint after concluding that the Board had exclusive jurisdiction to resolve the dispute, under San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245 (1959)

.

After the strike concluded on April 4, 1996, Beverly refused to reinstate approximately 350 striking employees. Approximately 100 other striking employees returned to work, but were not permitted to resume their former positions. Docket no. 1, ¶ 5(ss) and (tt). Negotiations between Beverly and its employees continued to be unfruitful. Thereafter, on May 9, 1996, the Board issued an order

consolidating all of the unfair labor practice charges against Beverly, and a consolidated complaint and notice of hearing were filed with the agency. Docket no. 1, ¶ 5(a). The Board issued an amended consolidated complaint on June 19, 1996. Id., ¶ 5 (b).

On July 8, 1996, the Board initiated this action by filing a consolidated Complaint and Petition for Injunction Under Section 10(j) of the NLRA, requesting "appropriate injunctive relief" pending its final disposition of the unfair labor practice charges against Beverly. Docket no. 1. The Board contended that there was "reasonable cause" to believe the allegations that Beverly engaged in the unfair labor practices cited in its administrative complaint against Beverly. It further claimed that injunctive relief to prohibit Beverly from continuing to engage in conduct allegedly violative of sections 7 and 8 of the NLRA would be "just and proper." In the absence of injunctive relief, the Board contended that Beverly would continue "to restrain and coerce employees in the exercise of the rights guaranteed in section 7 of the Act . . . ." Docket no. 1 ¶ *. The Board further claimed that, unless Beverly is enjoined, a "serious flouting of the Act will continue, with the result that enforcement of important provisions of the Act and the public policy underlying the same will be thwarted. . . ." Id., at ¶ 9. The prayer for injunctive relief not only addressed the conduct constituting the alleged unfair labor practices which occurred prior to the strike, but also requested the reinstatement to their former

positions of all employees who had unconditionally offered to return to work on April 4, 1996 following the April 1 strike. Id., ad damnum clause, ¶¶ 1 and 2.

In its Memorandum of Points and Authorities in Support of Complaint and Petition for Injunctive Relief, the Board identified the central issue before me as whether the Board had reasonable cause to believe that Beverly violated the Act by:

> refusing to properly reinstate hundreds of employees who engaged in a protected strike to protest [Beverly's] unfair labor practices and by making unilateral changes and engaging in other conduct which undermined the Unions' status as exclusive bargaining representatives. . . .

Docket no. 8, at 3. The Board's position. in short, is that the strike complied with § 8(g) because the unilateral extension was consistent with longstanding Board precedent.

Beverly answered the Board's Complaint and Petition for Injunction and immediately moved for partial summary judgment. Docket nos. 16 and 18. Its motion asserted that the Board's request for reinstatement of striking employees should be denied because the Board could not satisfy the prerequisites for a § 10(j) injunction. Beverly argued that the strike was illegal because the notice extending the strike date for 71 hours was issued unilaterally. Beverly submitted that the unions' failure to obtain its agreement as required by the

clear and unambiguous language of § 8(g) rendered the strike unlawful, and that, therefore, the striking workers seeking reinstatement were unprotected by the Act. Docket no. 19.

The Board responded with its own motion for partial summary judgment. It contends, not surprisingly, that its legal theory that Beverly's failure to reinstate the striking employees is well grounded and more than satisfies its burden under §10(j). Docket no. 28.

III. Discussion

A. Overview

Under § 10(j) of the National Labor Relations Act, 29 U.S.C. § 160(j),[1] district courts are authorized to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. To resolve § 10(j) petitions, district courts in the Third Circuit apply a two-

---

[1]Section 160(j) provides in relevant part:

> (j) The Board shall have power, upon issuance of a complaint . . . charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court. . . . for appropriate temporary relief or restraining order. Upon the filing of any such petition the court . . . shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

pronged test: 1) is there "reasonable cause to believe" that a violation of the Act has occurred; and 2) is temporary injunctive relief "just and proper." Pascarall v. Vibra. Screw Inc., 904 F.2d 874, 877 (3d Cir. 1990) (citing Kobell v. Suburban Lines, 731 F.2d 1076, 1088-89 (3d Cir. 1984)).

The "reasonable cause, inquiry has itself

> been refined into a two pronged standard. First, there must be a substantial, non-frivolous, legal theory, implicit or explicit, in the Board's argument, and second, taking the facts favorably to the Board, there must be sufficient evidence to support that theory.

Pascarell, 904 F.2d at 882 (citing Kobell, 731 F.2d at 1084). The breadth of this inquiry is limited because a § 10(j) proceeding is ancillary to the unfair labor practice charges committed to the exclusive jurisdiction of the Board. See Hirsch v. Building & Const. Trades Council, Etc., 530 F.2d 298, 302 (3d Cir. 1976) (discussing the extent of the showing required for an injunction under § 10(l), a companion provision within the NLRA). The Board "need not prove that a violation of the NLRA has in fact occurred. Nor must [it] convince the district court of the validity of the legal theory upon which [it] predicates (its] charges." Id. The Board's burden of proof in a reasonable cause determination is "relatively insubstantial." Id., see also Kobell, 731 F.2d at

1084.

Although the "just and proper" prong is derived directly from the language of § 10 (j) , the Act does not define the term. Pascarell, 904 F.2d at 878. The Third Circuit has held that the "just and proper" prong is satisfied:

> when the nature of the alleged unfair labor practices are likely to jeopardize the integrity of the bargaining process and thereby make it impossible or not feasible to restore or preserve the status quo pending litigation. The theory is that the chilling effect of management retaliation may outlast the curative effects of any remedial action the Board might take including reinstating illegally discharged workers. Ultimate reinstatement may very well not vindicate the public interest in the "integrity of the collective bargaining process."

Id., at 878-79 (citing Eisenberg, Etc. v. Wellington Hall Nursing Home, 651 F.2d 902, 907 (3d Cir. 1981)).

Although the Board has filed for summary judgment under § 10(j) , that motion is not yet ripe for resolution. The crossmotions for partial summary judgment at issue herein seek only to have this Court determine whether the Board's legal theory concerning § 8(g) of the NLRA is "substantial and not frivolous." For that reason, this opinion only addresses the issue of the substantiality of the Board's legal

theory, which is the first prong of the "reasonable cause" inquiry under § 10(j).

B. Substantiality of the Board's Legal Theory

The notification statute at issue reads as follows:

> Notification of intention to strike or picket at any health care institution
>
> A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of subsection (d) of this section. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by written agreement of both parties.

29 U.S.C. § 158(g).

Although the bare language of the statute makes no mention of it, the Board argues that extensions of up to

seventy-two hours are well -established in labor law. As proof of this, it directs the Court to the Board's own precedent, Bio-Medical Applications of New Orleans, Inc.., 240 NLRB 432 (1979), which holds that a union's unilateral extension of a strike date within a 12 to 72 hour period does not constitute an unfair labor practice despite § 8(g)'s language regarding extensions of strike dates.

That decision relied upon the legislative history of §8(g) which addressed brief delays by a union in the timing of a strike after the initial ten day notice has been tendered.[2] The Board reasoned that the "Union was in substantial compliance with Section 8 (g) and that to apply Section 8 (g) here in such a technical fashion so as to deprive the strikers of their status as employees would constitute an unwarrantedly harsh result not intended by Congress." 240 NLRB at 435-36.

The Board argues that Bio-Medical Applications has been uniformly followed since it was decided in 1979, and that its interpretation has not been altered by any circuit court decision or by any Congressional action. Based on this 17-year old precedent, the Board contends that it has reasonable cause to believe that Beverly has committed an unfair labor

---

[2]The amendment was prompted by "Congress' concern 'that sudden, massive strikes [at health care institutions] could endanger the lives and health of patients. . . .'" NLRB v. Washington Heights-Mental Health Coun., 897 F.2d 1238, 1247 (2d Cir. 1990) (quoting NLRB v. Stationary Eng'rs. Local 39, 746 F.2d 530.533 (9th Cir, 1984))

practice due to its failure to reinstate approximately 350 striking employees, as well as its failure to place approximately 100 other reinstated employees to the same positions that they held before the strike.[3]

Beverly, on the other hand, asserts that the Board falls short of meeting the "substantial and not frivolous" requirement of the reasonable cause determination. The Board's legal theory fails, in Beverly's view, because the unions, unilateral extension of the strike date is contrary to clear and unambiguous language in the Act which seems to require an agreement by both parties.

Beverly's opposition is centered upon the judicial scrutiny of agency interpretations of statutes mandated by the Supreme Court in Chevron, U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Under Chevron, if Congress's intent is clear, then that clearly-expressed intent of Congress must be enforced. 467 U.S. at 842-43. Any agency interpretation contra to the statutory mandates of Congress cannot withstand judicial scrutiny.

---

[3]Failure to reinstate an unfair labor practice striker who has made an unconditional offer to return to work violates §§ 8 (a) (1) and (3) of the NLRA. Cast Optics 458 F.2d at 407-08. The Board notes that it is well established that "unfair labor practice strikers may not be permanently replaced and are entitled to immediate reinstatement upon making an unconditional offer to return to work." Docket no. 8, at 23 (citing, inter alia NLRB v. Cast Optics Corp., 458 F.2d 398, 407-08 (3d Cir.), cert. denied 409 U.S. 850 (1972)).

However, Beverly fails to understand the statutorily-established procedural posture or this case. Beverly's assertion that I must construe § 8 (g) before I can determine the substantiality of the Board's legal theory is flawed, and out of line with the system of judicial review crafted by Congress for labor relations cases. Conducting a full Chevron review of § 8 (g) of the Act as it relates to this case would be tantamount to a decision on the merits of the unfair labor practice charge pending before the Board. Third Circuit jurisprudence clearly instructs that district courts cannot reach the merits of a decision in § 10(j) proceedings. Kobell, 731 F.2d at 1084; Hirsch, 530 F.2d at 302. See also Local 30, United Slate, Tile & Comp. Roofers v. NLRB 1 F.3d 1419, 1425 n. 9 (3d Cir. 1993) ("a section 10(l) proceeding is independent of the proceeding on the merits . . . .").

A district court's scrutiny of the Board's legal theory in a § 10(j) proceeding requires only a determination of whether the legal theory has a reasonable foundation, not whether the Board's theory is "valid." Kobell, 731 F.2d at 1084 (quoting Hirsch, 530 F.2d at 302). As stated in Kobell, "discerning the plausible penumbras of Labor Act provisions is a task that a three-judge appellate tribunal with responsibility to secure uniformity in the law is better equipped to perform than a trial court." 731 F.2d at 1085.

Beverly asserts correctly that the Board cannot avoid judicial evaluation of an untested legal theory in conflict with the plain language of the statute. Presuming that the Board

follows its precedent in this case, and determines that Beverly committed an unfair labor practice, Beverly will have the opportunity to obtain the judicial evaluation it seeks from the Court of Appeals, under the appellate procedure established by Congress. See 29 U.S.C. §160(f).

IV. Conclusion

The Board's legal theory concerning § 8(g) of the NLRA, is substantial and nonfrivolous. Partial summary judgment on this issue will be granted for the Board and against Beverly. Because the Board has established that its legal theory regarding § 8(g) is "substantial and not frivolous," an evidentiary hearing will be scheduled to inquire as to the suitability of injunctive relief under the "just and proper" prong of the "reasonable cause" standard. A separate order will be issued this date.

BY THE COURTS,

Date: /s/ 2/7/97

/s/ D. Brooks Smith
D. Brooks Smith
United States District Judge

cc: All Counsel of Record

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

GERALD KOBELL,	)	
Regional Director for Region	)	
Six of the National Labor	)	
Relations Board,	)	
Plaintiff	)	
vs.	)	Civil Action No.
	)	96-1280
BEVERLY HEALTH AND	)	
REHABILITATION SERVICES,	)	
INC., et al.,	)	
Defendants	)	

MEMORANDUM AND ORDER

SMITH, District Judge

I. Introduction

Before the court in this labor controversy is a Petition for Injunction filed by Gerald Kobell, the Regional Director for Region Six of the National Labor Relations Board (hereinafter "the Board") against Beverly Health and Rehabilitation Services, Inc., some of its subsidiaries and twenty of its health care facilities in the Commonwealth of Pennsylvania (hereinafter collectively referred to as Beverly).

The petition seeks temporary relief pursuant to § 10(j) of the National Labor Relations Act (NLRA), 29 U.S.C. §160(j), pending the resolution of unfair labor practice charges filed with the Board by employees of the twenty Beverly health care facilities. I conducted an evidentiary hearing on February 19 and 20, 1997, and the following constitute my findings of fact and conclusions of law.

II. Facts

I previously addressed cross-motions for partial summary judgment in this case and determined that the Board's legal theory was substantial and not frivolous. See dkt.no. 67. An excerpt from my memorandum disposing of those cross-motions supplements the record from the hearing and sets forth certain undisputed facts which are necessary to the resolution of the instant motion for injunctive relief.

> Beverly owns and operates over 750 health care facilities nationwide which provide care for elderly or infirm individuals. The service and maintenance employees at twenty of these health care facilities in Pennsylvania are unionized.[1] Dkt. no.

---

[1]The service and maintenance employees at these twenty Beverly health care facilities are represented by three local unions of the Service Employees International Union: District 1199P represents employees at eleven of the facilities; Local Union 585 represents employees at five of the facilities, and the employees at the remaining four facilities are represented by Local Union 668. Dkt. no. 77, at 10-11.

19, ¶ 3. The most recent collective bargaining agreements [CBAs] expired on November 30, 1995, except at two of the facilities where the agreements expired on December 3 1, 1994. Dkt.no. 19, ¶ 5.

Despite the expiration of the collective bargaining agreements, the unionized staff continued to work while negotiations proceeded. The unionized employees complained that certain changes at the health care facilities where they worked violated their rights under the NLRA to engage in concerted activity. The following examples represent some of the alleged violative conduct by Beverly: removal of union bulletin boards; denial of established access, at the respective facilities, of union representatives to union members; changes in health care insurance; reduction in work hours; unilateral changes in employee policies; denial of information relevant to contract negotiations; prohibitions against wearing union insignia; and prohibitions against bringing union literature onto the premises. It is also alleged that Beverly had direct contact with unionized employees in an effort to influence them concerning their continued affiliation with the union. Dkt.no. 1. These alleged unfair labor practices resulted in the filing of numerous charges with the Board against Beverly. See dkt.no. 1.

Dkt.no 67, at 2-3.

The alleged unfair labor practices occurred at some, but not all, of the health care facilities. Dkt.no. 77, at 27-32; Pl.Exh. 1. The predominant unfair labor practices were the removal of union bulletin boards and the denial of employee access at the health care facilities to the union representatives. Pl.Exh. 1.

Thereafter the unions voted to authorize strikes at fifteen of the facilities.

On or about March 15, 1996, the unions gave notice to the fifteen facilities of their intent to engage in an unfair labor practice strike commencing at 7:00 A.M. on Friday, March 29, 1996. The notice specifically stated that the written notice was being served as required by §8(g) of the NLRA, enacted as part of the 1974 Nonprofit Hospital Amendments to the Labor Management Relations Act. 29 U.S.C. §158(g). Dkt. no. 18, exh. A.

On March 27, 1996, the unions gave an additional notice to the fifteen facilities, this time advising of their intent to extend the of the strike from Friday, March 29, 1996 at 7:00 A.M. to Monday, April 1, 1996 at 6:00 A.M. It is undisputed that Beverly did not consent, either orally or in writing to this 71 hour extension.

The unions were advised by Beverly that the extension notice failed to fulfill the literal statutory requirements set forth in §8(g), and that it would

> consider unlawful any strike held pursuant to the seventy-one hour extension notice. Despite Beverly's lack of consent, a strike began on April 1, 1996 at the fifteen facilities, and continued until April 4, 1996 at about 7:00 A.M.

Dkt.no. 67, at 3-4.

The union notices to Beverly of its intent to strike at each of the fifteen facilities state that the "union shall begin to engage in a strike, picketing and other concerted refusal to work activities to protest unfair labor practices committed by Beverly Dkt.no. 76, exh. A (emphasis added). The extension notices from the union also state that "the Union shall engage an unfair labor practice strike. . ." Id., exh. B (emphasis added). Beverly acknowledged the union's characterization of its activity as an unfair labor practice strike when it responded to the union that it considered the union's notice of the 71 hour extension defective. Id. exh. C.

After the strike concluded on April 4, 1996, Beverly refused to reinstate many of the striking employees, despite an unconditional offer by all of them to return to work. Beverly reinstated to their former positions a total of 290 employees, from April 1996 to January 1997. Dkt.no. 77, at 62. Another 237 employees were recalled, but not to their former positions. Many of the employees were recalled to part-time capacities in different positions, or to different shifts from those they had worked in before the strike. Dkt. no. 77, at 6 1. As of January 1997, 66 employees had not been

reinstated and a total of 115 either quit or been fired. Dkt.no. 77, at 66; pl. exh. 14.

> [O]n May 9. 1996, the Board issued an order consolidating all of the unfair labor practice charges against Beverly, and a consolidated complaint and notice of hearing were filed with the agency. Dkt.no. 1, ¶5(a). The Board issued an amended consolidated complaint on June 19, 1996. Id., ¶5(b).
>
> On July 8, 1996, the Board initiated this action by filing a consolidated Complaint and Petition for Injunction Under Section 10(j) of the NLRA, requesting "appropriate injunctive relief" pending its final disposition of the unfair labor practice charges against Beverly. Dkt.no. 1. The Board contended that there was "reasonable cause" to believe the allegations that Beverly engaged in the unfair labor practices cited in its administrative complaint against Beverly. It further claimed that injunctive relief to prohibit Beverly from continuing to engage in conduct allegedly violative of sections 7 and 8 of the NLRA would be "just and proper." In the absence of injunctive relief, the Board contended that Beverly would continue to restrain and coerce employees in the exercise of the rights guaranteed in Section 7 of the Act...." Dkt.no. 1, ¶8. The Board further claimed that, unless Beverly is enjoined, a "serious flouting of the Act will continue, with the result that enforcement

of important provisions of the Act and the public policy underlying the same will be thwarted...." Id., at ¶9. The prayer for injunctive relief not only addressed the conduct constituting the alleged unfair labor practices which occurred prior to the strike, but also requested the reinstatement to their former positions of all employees who had unconditionally offered to return to work on April 4, 1996 following the April 1 strike. Id., ad damnum clause ¶¶1 and 2.

Dkt.no. 67, at 5-6.

During the evidentiary hearing before me, the Board called several witnesses to testify. The chief witness was Thomas V. DeBruin, the president of Local 1199P and the designated chief spokesperson in contract negotiations for all three locals. Dkt.no. 77, at 15.

DeBruin's testimony established that, after the expiration of the collective bargaining agreement, the bulletin boards in many of the facilities were either taken down by the employer, or union personnel were forbidden from posting any information on them. Id., at 24. According to DeBruin, lack of access to the bulletin boards "seriously limited" the union's ability to communicate regularly with its members in the various facilities. Id., at 28.

In addition to the removal of bulletin boards, Beverly also curtailed access to union representatives after the expiration of the CBAs. Under previous agreements, union staff were permitted to contact members during the work day

and meet with them in break rooms. After the agreements expired, union access to employees was barred unless the administrator of a particular facility approved the meeting beforehand. Dkt.no. 77, at 30. In some cases, police were called to have the union representative removed from the facility. Id.

In some facilities, union personnel were instructed not to talk about the union, and not to wear union buttons and insignia. Dkt.no. 77, at 50-51. This anti-union message from management also took the form of conspicuous records-keeping of certain concerted union activities at some facilities. Some union members who participated in activities such as informational picketing observed either management personnel recording the names of participants or security personnel filming the participants engaged in the activity. Dkt.no. 77, at 51-52. These efforts by management had a chilling effect on union members and discouraged full employee participation. Id., at 53.

Union strength at the facilities was also affected by the gradual return to work of many of the employees who engaged in the April 1, 1996 strike. This return to work at varying hours and different positions affected the union's efforts to effectively bargain with Beverly in two ways. First, with employees returning to different jobs and shifts, the union had to reestablish its leadership at each facility, as well as its communication network. The disruption of the normal union communication channels made it difficult to dispatch

information, and to determine whether information was actually received by those for whom it was intended. Dkt. No. 77, at 88. Second, because employees wanted to talk only about "the replacement issue," considerable time had to be devoted to that issue alone, to the exclusion of other concerns. Id., at 89-90.

Union stability was also dealt a serious blow by the filing of six decertification petitions. Petitions were filed to decertify the unions at Haida Manor, Richland Manor, Mt. Lebanon Manor, Fayette Health Care Center, William Penn Nursing Center and Clarion Care Center. Pl. Exh. 26. Significantly, Haida Manor, Richland Manor, William Penn Nursing Center, and Fayette Health Care Center are facilities where employees have a low turnover rate and above-average seniority. Richland Manor and Fayette have historically shown strong union support. Dkt. no. 78, at 149-53.

The evidence also supports a conclusion that, to some extent, participation in certain union activities has declined. Dkt.no. 77, at 111, Pl. Exh. 29. Many of the union employees who actively participated in the April 1, 1996 strike have voiced their refusal to participate in a strike again. Dkt.no. 77, at 111.

The record is replete with various forms of pro-union literature. But this plethora of informational fliers and bulletins intended for union members is not a reliable indicator of the unions' strength. All that it demonstrates is the considerable effort exerted to maintain a positive outlook

in the wake of the strike and during the pendency of the unfair labor practice proceedings. In fact, much of the written material was generated by an additional union operative who was brought on board specifically to assist in bolstering union support and activity. Dkt.no. 78, at 212.

III. Standard for Issuance of Relief under § 10(j)

The temporary relief available under § 10(j)[2] requires a determination by the district court of "whether there is 'reasonable cause' to believe that an unfair labor practice has occurred and whether an injunction would be 'just and proper.'" Pascarell v. Vibra Screw, Inc. 904 F.2d 874, 877 (3d Cir. 1990)(citing Kobell v. Suburban Lines, 731 F.2d 1076, 1088-89 (3d Cir. 1984)). The reasonable cause inquiry in a § 10(j) proceeding necessitates a determination as to whether there is a substantial nonfrivolous legal theory and whether the facts construed in the light most favorable to the Board constitute sufficient evidence to support the asserted legal

---

[2]Section 10(j) of the National Labor Relations Act (NLRA) provides in relevant part:

> (j) The Board shall have power, upon issuance of a complaint. . . charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, . . . for appropriate temporary relief or restraining order. Upon the filing of any such petition the court . . . shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

29 U.S.C § 160(j).

theory. 904 F.2d at 882 (citing 731 F.2d at 1084).

The Board's theory that Beverly has committed unfair labor practices prior to the April 1, 1996 strike is substantial and nonfrivolous because Beverly's conduct, if proven, would violate express statutory provisions precluding an employer from interfering with, restraining or coercing an employee in the exercise of his right to engage in concerted activity, 29 U.S.C. §158(a)(1). I have already determined that the Board's legal theory that the April 1, 1996 strike complied with the notice requirements of §8(g) was substantial and nonfrivolous. Dkt. 67. Accordingly, I need only determine if there are sufficient facts in the record to support the theory and if equitable relief is "just and proper."

IV. Factual Inquiry of Reasonable Cause Prong

The Board asserts that the evidence of record is more than enough to establish that there were unfair labor practices occurring at the various facilities and that the strikers were engaging in protected activity under the NLRA. During the arguments of counsel presented at the conclusion of the evidentiary hearing, I inquired whether this dispute boiled down to a question of whether relief would be "just and proper." Dkt. no. 80, at 480. Beverly's counsel replied: "I think predominantly so." Id. Counsel for Beverly also conceded during his closing argument that the evidence suggesting that the April, 1996 strike was a strike in protest of alleged unfair labor practices was strong. Id. Finally, he

conceded that he could not argue to the contrary when asked, by this court, if the evidence met the "pretty easy" test. Dkt.no. 80, at 482.

Beverly now contends in its Post-Hearing Brief that it "does not concede reasonable cause to believe the strike was an unfair practice strike." Dkt.no. 85, at 11. Beverly submits that "[a]lthough the union attempted to create the appearance that the strike was to protest alleged unfair labor practices, the evidence suggests that the unions' efforts were an elaborate pretext designed to avoid the consequences of an economic strike driven by bargaining considerations." Id.

Beverly's position fails to recognize that the Board need not prove that a violation occurred. As the Third Circuit instructs, such a determination is for the Board in the first instance. Hirsch v. Building & Const. Trades Council, Etc., 530 F.2d 298, 302 (3d Cir. 1976). The Board's burden of proof before the district court is "relatively insubstantial." 904 F.2d at 1084 (citing Hirsch, 530 F.2d at 302). The only question before me on this issue is whether some evidence is present demonstrating the elements of an unfair labor practice. 530 F.2d at 302. In determining whether there is sufficient evidence to support the Board's legal theory, the district court must accord considerable deference to the Bond on the facts. 731 F.2d at 882.

Based on this standard and the evidence of record, and viewed most favorably to the Board, I conclude that the Board has met its relatively insubstantial burden of presenting

evidence that would support not only the elements of the unfair labor practices prior to the strike, but also that the strike was in protest of the alleged unfair labor practices.

V. "Just and Proper" Prong

The standard to be applied by a district court in determining whether temporary relief pursuant to §10(j) is "just and proper" is less than clear. 731 F.2d at 1089. The Third Circuit has instructed that such a determination must be informed by the policies underlying § 10(j). Eisenberg v. Lenape Products, Inc., 781 F.2d 999, 1003 (3d Cir. 1986); Suburban Lines, 731 F.2d at 1090-91. "Congress sought to ensure that the Board would be able to exercise effectively its ultimate remedial power." Lenape Products, 781 F.2d at 1003. As a result, § 10(j) was designed to enable the Labor Board to vindicate its ultimate remedial power by affording limited interim relief in instances where the passage of time reasonably necessary to adjudicate the case on its merits convinced the Board and the federal courts that the failure to grant such relief might dissipate the effective exercise of such power." 731 F.2d at 1091. The focus, therefore, is not upon the "'egregiousness of the unfair labor practice but on the unusual likelihood . . . of ultimate remedial failure." Id., n. 26 (emphasis in original).

A consideration of the policies underlying § 10(j) necessitates a recognition of "the public interest implicit in protecting the collective bargaining process. . . ." 904 F.2d at

879. This is so because the purpose of § 10(j) is not to vindicate the interests of those employees who have allegedly been harmed by the unfair labor practices at issue, but to act in the public's interest. Id. at 876; Eisenberg v. Wellington Hall Nursing Home, 651 F.2d 902, 906-07 (3d Cir. 1981); Senate Report no. 105, 80th Cong., 1st Sess.8, 27 (1947). "The public interest at stake is the promot[ion of] wholesome and mutually acceptable labor relations and the settlement of labor disputes through collective bargaining between employees and their employer.'" 904 F.2d at 876 (quoting Eisenberg v. Hartz Mountain Corp., 519 F.2d 138, 142 (3d Cir. 1975)).

In applying these principles, a district court "should discuss and determine whether the failure to grant interim injunctive relief would be likely to prevent the Board, acting with reasonable expedition, from effectively exercising its ultimate remedial powers." 731 F.2d at 1091-92. Hence, "the critical determination is whether, absent an injunction, the Board's ability to facilitate peaceful management-labor negotiation will be impaired." 904 F.2d at 879 (emphasis added).

The degree of impairment that must be present to warrant injunctive relief under § 10(j) is not spelled out in the case law. But the analysis underlying a determination of whether granting §10(j) relief is appropriate begins with a consideration of the nature of the alleged unfair labor practices and their impact upon the collective bargaining

process. 904 F.2d at 878. This factual inquiry focuses upon "the likelihood of harm to the bargaining process in the interim." Wellington Hall, 651 F.2d at 907. "Unless there are circumstances, like the size, intimacy, and longevity of the bargaining unit, which indicate that the bargaining process will not be harmed, courts must be deferential to the Board's determination that the integrity of the process needs interim protection." 904 F.2d at 979 n.7.

The "likelihood of harm to the bargaining process" means that it is reasonable to expect under the facts of the case that there will be some adverse impact upon the process as a result of alleged unfair labor practices. Hartz Mountain, 519 F.2d at 142 (judicial action warranted under § 10(j) must be determined on a case by case basis). For example, in Wellington Hall 651 F.2d at 907, the court found that the discharge of eight employees in a small bargaining unit would in "all likelihood" undermine union support at a critical stage of the bargaining process. So too, in Pascarell, 904 F.2d at 880, the court reversed the district court's denial of interim relief finding that the discharge of four members of the bargaining committee of a recently certified union would jeopardize the union's ability to remain stalwart during the pendency of the administrative proceedings. Accordingly, the interim relief available under §10(j) is not limited to those instances where the collective bargaining process will be completely frustrated or defeated by the alleged unfair labor practices.

Third Circuit jurisprudence nonetheless cautions that the remedial relief available under § 10(j) is not always appropriate. If the harm from the alleged unfair labor practices, while theoretically damaging to the collective bargaining process, is in reality either of minimal consequence or outweighed by the resulting harm to the integrity of existing labor agreements, interim relief should be denied. For example, in Suburban Lines, 731 F.2d at 1076, the court recognized that § 10(j) relief may not be proper if the alleged unfair labor practice is against an established, "small and intimate" bargaining unit. In such a case, "if the alleged retaliation is against an established, 'small and intimate' bargaining unit, improper attempts by management to impair the collective bargaining process will have minimal 'chilling' effect because the employees will, most likely, be fully aware of their rights under the NLRA." 904 F.2d at 879 (citing 731 F.2d at 1093)(emphasis added). In Lenape Products, 781 F.2d at 999, the harm to the bargaining process was illusory because management was unaware of the organizational efforts of the employees and the discharge of certain individuals could not "interpreted by the employees as retaliation against union activity. See also 904 F.2d at 880 discussing Lenape Products.

In Hartz Mountain, 519 F.2d at 138, a § 10(j) injunction was reversed because the injunction actually did more harm than good to the collective bargaining process. There, the unfair labor practice was filed by a rejected union

after the employer subsequently recognized another union. The injunction restrained the employer from giving effect to the existing collective bargaining agreement which provided health and welfare benefits for the employees. The circuit court recognized that the temporary relief issued by the district court served to protect the rejected union against possible further erosion of employee support and insure that the competition between the labor unions would be fair. Nevertheless, it reversed the injunction. reasoning that the more important public interest was to insure the functioning of the existing collective bargaining agreement and the provision of the benefits it guaranteed. 519 F.2d at 142.

Beverly contends that this court should apply traditional equitable considerations in ruling upon the Board's request for § 10(j) injunctive relief, and follow the lead of several sister circuits that have abandoned the reasonable cause/just and proper inquiry. See Pye v. Sullivan, 38 F.3d 58 (1st Cir. 1994), Miller v. California Pac.Medical Center, 19 F.3d 449, 458 (9th Cir. 1994)(en banc); and Kinney v. Pioneer Press, 881 F.2d 485 (7th Cir. 1989). My reading of Third Circuit authority fails to reveal any inclination to abandon the reasonable cause/just and proper inquiry. In Suburban Lines 731 F.2d at 1078, the court specifically noted that interim relief under §10(j) may be granted "without the showing of irreparable harm and a likelihood of success on the merits, which are the ordinary requisities. . . ." Judge Aldisert's concurrence in Suburban Lines confirms that the

Third Circuit's analysis of the just and proper prong in a § 10(j) proceeding is distinguishable "from a request for a mine-run preliminary injunction [in] that the Regional Director, as the plaintiff, has a rather low threshold to meet his or her burden of proof. 731 F.2d at 1095. As a district court, I am not free to follow the lead of other courts of appeal when their jurisprudence on a point is at variance with Third Circuit decisions. Because I conclude that the reasonable cause/just and proper inquiry is alive and well in this circuit, I decline Beverly's invitation to replace it with traditional equity principles.

VI. Application of the Just and Proper Prong

As noted above, the "critical determination is whether, absent an injunction, the Board's ability to facilitate peaceful management-labor negotiation will be impaired." 904 F.2d at 879. I am satisfied that there is sufficient evidence to demonstrate that, without the issuance of an injunction, the Board's ultimate remedial powers may be frustrated. That, I conclude, constitutes the requisite impairment.

Beverly's alleged unfair labor practices have been selectively geared to destroy or at least impede the communication network among union members. By removing the bulletin boards and returning employees to different jobs and different shifts, Beverly has forced the union to recompose its infrastructure at each facility. Beverly's actions have prolonged the amount of time

necessary to disseminate information, and have tended to demoralize the union ranks and impede whatever collective bargaining has occurred.

The weakening of the communication network has had a substantial impact upon the morale of the union members. The pendency of six decertification petitions is persuasive evidence of this. The decertification petitions are significant because they have been filed at some of the nursing facilities with considerable longevity among employees and with traditionally strong union support. If decertification proceeds, the Board's ability to remedy any unfair labor practices may be completely undermined simply due to the nonunion status of these former union strongholds.

Accordingly, I conclude that interim relief under §10(j) should be granted.

VII. Single-Employer

The Board seeks a blanket injunction against all twenty Beverly nursing homes named in this suit. The Board asserts that such relief is appropriate because these twenty nursing home facilities constitute a "single-employer" under the Act. Dkt.no. 82, at 27. The Board submits that application of the single-employer theory to several entities in a § 10(j) injunction proceeding has been upheld by the Third Circuit. See Eisenberg v. Holland Rantos Co., 583 F.2d 100 (3d Cir. 1978). Beverly contends that a blanket injunction should not issue because the "'single employer' doctrine applies in

situations where two entities are performing the same function, but one has a collective bargaining relationship and the other does not." Dkt.no. 85, at 53. Beverly points out that there is no separate unrepresented entity in this case.

A "single employer" "exists where two nominally separate entities are actually part of a single integrated enterprise so that, for all purposes, there is in fact only a 'single employer.'" NLRB v. Browning-Ferris Industries, Etc., 691 F.2d 1117, 1122 (3d Cir. 1982). This doctrine "is relevant to the determination that 'separate corporations are not what they appear to be, that in truth they are but divisions or departments of a single enterprise.'" Id. The determination of whether two or more business entities are sufficiently integrated to warrant unitary treatment requires consideration of four factors: (1) functional integration of operations; (2) centralized control of labor relations; (3) common management and (4) common ownership. Id.

One of the strongest indicators that the twenty nursing facilities are a single employer was Beverly's inclusion of each of the twenty nursing facilities as a party plaintiff in the Johnstown civil action initiated in an effort to stop the strike which commenced on April 1, 1996. See Beverly Enterprises - Pennsylvania, Inc., et. al. v. District 1199P, Service Employees International Union, AFL-CIO et. al. Civil Action no. 96-64J. Beverly owns each of the twenty facilities and Wayne Chapman, Beverly's vice-president of operations for the central and eastern part of Pennsylvania and New Jersey,

has total operational responsibility for these facilities. Dkt.no. 79, at 261-62. Mr. Chapman also had a hand in the contract negotiations for each of these facilities. Dkt.no. 79, at 267-68. Once the contracts at these twenty facilities expired, Mr. Chapman issued certain communications to the various facilities regarding the necessity of observing specific provisions in the expired contracts. See pl.exh. 2, 32.

These facts support the Board's assertion that the twenty nursing facilities constitute a single employer. The facilities, though managed separately at each site, are integrated in their overall management and labor relations. Their common ownership serves as a cohesive force presenting a unitary opponent to the unions. I conclude that treatment of Beverly as a single employer is appropriate to achieve and enforce the remedial relief warranted under § 10(i).

VIII. Appropriate Interim Relief

Where interim relief is appropriate under § 10(j), the relief that is granted should be based on a case by case determination of "what judicial action will be in the public interest." 731 F.2d at 1096 (J. Aldisert concurring)(citing Hartz Mountain, 519 F.2d at 142). Only that relief "reasonably necessary to preserve the ultimate remedial power of the Board" should be granted; §10(j) should not become the normal method for resolving labor disputes. 904 F.2d at 1091. Furthermore, any injunctive relief warranted

under § 10(j) "should include an explicit time limitation, not longer than six months, on the restraint it imposes." Hartz Mountain 519 F.2d at 144.

As indicated in section VI, relief is appropriate in light of the damage to the union's communication network at the various facilities. The most effective way of restoring that communication network is to reinstate the employees in the positions they held prior to the April 1, 1996 strike, and to return the bulletin boards at each facility.

Although the reinstatement of these employees is likely to be disruptive for Beverly, it should be no more disruptive than the original replacement of these workers after the strike. Third Circuit law instructs that "concern about protecting the employer from the harm from an injunction in the employee reinstatement context" is misplaced. Hartz Mountain, 651 F.2d at 906. The appropriate focus is upon "the likelihood of harm to the bargaining process in the interim." Id., at 907. In the absence of full reinstatement, the communication network of the unions at some of the facilities may be nonexistent when final adjudication by the Board is issued. By that time, the remedial power of the Board would be exercised too late.

ORDER

AND NOW, this day /s/ 4th of April 1997, consistent with the foregoing Memorandum, it is hereby

ORDERED and DIRECTED that the Petition for

Injunction Under § 10(j), docket no. 1 is GRANTED. Defendants, its officers, representatives, agents, servants and employees are directed to reinstate and maintain a bulletin board at each of the health care facilities for the use of the union personnel. Access to the union bulletin boards shall be made available forthwith, and in no event later than April 11, 1997. It is further ORDERED that defendants, its officers, representatives, agents, servants and employees shall offer full reinstatement to all employees who engaged in the unfair labor practice strike which began on April 1, 1996, said reinstatement to be to their former positions of employment, including reinstatement to their former scheduled and work stations, or, if these former positions no longer exist, to substantially equivalent positions, displacing, if necessary, any employees hired to replace said employees. Reinstatement shall commence forthwith, and be completed within thirty (30) days, that is on or before May 5, 1997. It is further

ORDERED that this case shall remain on the docket of this Court and, on compliance by respondent with its obligations undertaken hereto and upon disposition of the matters pending before the Board, the Petitioner shall cause this proceeding to be dismissed.

This Order shall expire six months from the date of its issuance; provided however, that Petitioner may, upon motion, request a thirty (30) day extension of this Order if it appears that the decision of the Board's administrative law

judge on the underlying unfair labor practice complaint in NLRB cases 6-CA-27873, et al., is imminent. Provided further, that after the issuance of said decision of the administrative law judge, upon motion of Petitioner, this Order may be extended, pending the Board's final decision, for an additional period not to exceed six months; provided further, that Petitioner may, upon motion, request an additional thirty (30) day extension of this Order if it appears that the final decision of the Board on the underlying unfair labor practice complaint is imminent.

BY THE COURT,

/s/ D. Brooks Smith
D. Brooks Smith
United States District Judge

cc:

Dalia Belinkoff Esq.
Julie Rose Stern, Esq.
JoAnn F. Dempler, Esq.
Terrence H. Murphy, Esq.
Michael J. Manzo, Esq.
Ronald A. Berlin, Esq.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

EVIDENCE

Defendant's Exhibit 2

SUMMARY - STRIKING EMPLOYEES
February 14,1997

Total No. of Striking Employees	750
No. of Striking Employees Returned	662
No. of Striking Employees Not Returned	84

* * *

No. of Nursing Homes With Fewer Than 5 Employees on Reinstatement List	10
No. of Nursing Homes With More Than 10 Employees on Reinstatement List	3

Defendant's Exhibit 3

UNITED PARCEL SERVICE

March 15,1996

Casey Wieczorek, Administrator
BEVERLY MANOR OF MONROEVILLE
4142 Monroeville Boulevard
Monroeville, Pennsylvania 15146

Dear Mr. Wieczorek:

I am writing to you on behalf of District 1199P, Service Employees International Union. AFL-CIO, CLC, regarding the bargaining units at Beverly Manor of Monroeville, Monroeville, Pennsylvania:

All full-time and part-time licensed practical nurses

Pursuant to the Taft-Hartley amendments, you are hereby notified that the aforesaid Union shall begin to engage in a strike, picketing and other concerted refusal to work activities to protest unfair labor practices committed by Beverly Health and Rehabilitation Services, Inc., and Beverly Manor of

Monroeville commencing at *7:00 AM on Friday, March 29, 1994 in Monroeville, Pennsylvania.*

Copies of this notice are hereby being sent, via United Parcel Service, to the Federal Mediation and Conciliation Service and the Pennsylvania Bureau of Mediation.

Sincerely,

/s/ Thomas V. DeBruin
Thomas V. DeBruin
President
[District 1199P]

Defendant's Exhibit 4

FAX COMMUNICATION: (412) 373-2435
and UNITED PARCEL SERVICE

March 27,1996

Casey Wieczorek, Administrator
BEVERLY MANOR OF MONROEVILLE
4142 Monroeville Boulevard
Monroeville, Pennsylvania 15146

Dear Mr. Wieczorek:

Please consider this letter as notification pursuant to the Taft-Hartley amendments that District 1199P, Service Employees International Union AFL-CIO CLC is hereby extending the 10-day notice whereby the Union shall engage in an unfair labor practice strike, picketing and other concerted refusal to work activities by seventy-one hours, from 7:00 AM March 20, 1996, until 6:00 AM Monday, April 1, 1996. The bargaining unit involved is the same as spelled out in the original 10-day notice dated March 15, 1996, as follows:

All full-time and part-time licensed practical nurses

Copies of this notice are hereby being sent, via United Parcel Service, to the Federal Mediation and Conciliation Service and the Pennsylvania, Bureau of Mediation.

Sincerely,

/s/ Thomas V. DeBruin
Thomas V. DeBruin
President
[District 1199P]

Defendant's Exhibit 5

Thomas V. DeBruin, President
District 1199P
1402 South Atherton Street
State College, PA 16801-6288

Re: Defective Strike Notice

Dear Mr. DeBruin:

Beverly Manor of Monroeville has received your letter of March 27. 1996. In it you advise that the facility should "[p]lease consider this letter as notification . . . that District 1199P . . . is hereby extending the 10-day notice whereby the Union shall engage in an unfair labor practice strike, picketing and other concerted refusal to work activities by seventy-one hour, from 7:00 AM March 29, 1996. until 6:00 AM Monday, April 1, 1996[]" for the bargaining unit described as 'All full-time and part-time service and maintenance employees".

This is to advise that we do not "consider [your] letter as notification", as you request. Instead, we conclude that it constitutes a new notice under Section 8(g) of the National Labor Relations Act ("Act"), and violates the terms of that section by failing to provide 10 days notice. Thus, we believe

that any strike, picketing and/or other concerted refusal to work activities conducted by the Union and/or its members, and/or other bargaining unit employees at the Union's behest, would be unlawful.

If the Union engages in any strike, picketing and/or other concerted refusal to work activities on April 1, 1996 (or at any other time) without compliance with the notice provisions of the Act, the facility will take all appropriate actions.

Sincerely,

/s/ Ellen
Ellen Weitz
Chief Negotiator

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

GERALD KOBELL, REGIONAL DIRECTOR FOR REGION SIX OF THE NATIONAL LABOR RELATIONS BOARD FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD, Petitioner	:	
-vs-	:	CIVIL NO: 96-1280
BEVERLY HEALTH AND REHABILITATION SERVICES, INC., et al., Respondent	:	

PROCEEDINGS: Injunction Hearing

BEFORE: Hon. D. Brooks Smith
Judge

DATE:	February 20, 1997 Afternoon Session 1:30 4:25 p.m.
PLACE:	Penn Traffic Building 319 Washington Street Johnstown, PA
REPORTED BY:	Maryann Cornelius Freelance Court Reporter Notary Public

* * * *

Court resolve this question as opposed to a Board with its acknowledged expertise in this area and expertise I deferred to notwithstanding the fact -- I want to say this, I wouldn't resolve the statutory interpretation issue the way the Board did. I don't read the statute that way, but the Board has and I believe that they're entitled to deference because of the special expertise that they have and because also, although I did not spell it out perhaps at quite the length I would have liked to, given the interest of time because the jurisprudence within this circuit is what it is with respect to legislative history and the legislative history was entitled to some deference there as well. So having granted that deference on the 8(g) issue why shouldn't I give deference here as well?

ATTORNEY ZAWATSKI: Well, Your Honor, obviously what we're seeking is interim. We're not asking the Court to finally rule on the ultimate determination of whether the various unfair labor practices have been committed by Respondent and what the remedy should be. We're asking for an interim relief pending the resolution by the Board. Unfortunately, Your Honor, the litigation process. . . .

* * * *